113 No. ( )

Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of the United States

RICHARD AND SHARON THEUSCH,

Pro-Se Petitioner,

v.

TAD BERG, et al.,

Respondents,

On Petition For Writ Of Certiorari To The State Of Minnesota In The Court Of Appeals

PETIION FOR WRIT OF CERTIORARI

Richard and Sharon Theusch
22308 Gateway Drive
Osakis, Minnesota 56360
320-732-3094

QUESTIONS PRESENTED

1) Whether Appellant and/or District Courts may utilize a prescriptive road statute, in the event of an inaccurately, and unlawfully recorded road, thus disregarding applicable law on the books threatens to overturn the Fifth Amendment "due process" and "just compensation" claus, encourages deprivation of rights forbidden under the Fourteenth Amendment; and "violates" the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970; which in turn, guarantees the "fair and equitable treatment of citizens whose property is taken for public use"?

2) Whether condoning extraordinary irregularities in a District Court, encourages deprivation of civil rights, threatens the integrity of the United States judicial system, undermines the basic right of every citizen to "equal justice under law" and "equal protection under law", and warrants an immediate appellant discretionary review?

PARTIES

Petitioners are Richard and Sharon Theusch. Respondents are Tad Berg and Everett Berg Individually and as Employees of or Subcontractors of Leslie Township and Leslie Township.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	17
A. Reasons why utilizing a prescriptive easement statute to take private property was not valid	23
B. Reasons why recording the road unlawfully and taking private property for public use without just compensation was not constitutional	33
C. Minnesota passed a compliance Act to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970	37

TABLE OF CONTENTS –Continued

Page

Appendix A: Opinion of the Court of Appeals of the State of Minnesota..... App. 1

Appendix B: Order of Todd County Minnesota State Trial Court.....App. 27

Appendix C: Order of Todd County Minnesota State Trial Court Amended Findings.....App. 33

Appendix D: Order of the Supreme Court of State of Minnesota Denying Review.....App. 40

Appendix E: Order Denying Defendant's Motion In Limine Regarding Notice and Penalty Issues.....App. 42

Appendix F: Order Vacating Portion of 1960 Little Deer Beach Plat Road.....App. 44

Appendix G: Documents Supporting Petition

Deposition..... App. 51

Police Report.....App. 52

Resolution to Record Roads.....App. 55

1960 Plat (Road).....App. 59

1981 Plat (Road).....App. 63

TABLE OF CONTENTENTS – Continued

Page

Appendix G: (continued)

Survey- Personal..... App. 65

Survey- County Surveyor..... App. 68

Letter to County Surveyor..... App. 71

Half Section Map..... App. 73

Letter to District Judge..... App. 74

Letter to Judge from Witness..... App. 78

Defendants' Refusal..... App. 80

Minutes Planning and Zoning..... App. 91

Photos of Septic..... App. 94

Video Trial Deposition..... App. 96

Court Document Void..... App. 99

Costs and Disbursements..... App. 100

Expert Resume..... App. 104

Withdraw from Oral Argument..... App. 109

Proposal/Town Road Study..... App. 111

Mileage Certification..... App. 114

Legal Abstract..... App. 116

1979 Tax Roll..... App. 118

Photo- Road Forking..... App. 119

Photo- Culverts..... App. 120

TABLE OF CONTENTENTS – Continued

Page

Appendix G: (continued)

Survey for Leslie Township..... App. 121

Notes- 1981 Plat..... App. 124

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Boyd v. US, 116 U.S. 616, 635, (1885)..... 32

Butz v. Economou, 438 U.S. 506, 98.....40

Harlow v. Fitzgerald, 102 S. Ct. 2727 at 2737 457 U.S. 800.....41

42 U.S.C.A 1981 et seq.; *Lavern v. Corning*, 316 F. supp. 629.....39

Watson v. Memphis, 375 U.S. 526; 10 L Ed 529; 83 S. Ct. 1414.....18

STATE COURT CASES

Banse v. Town of Clark, 59 Minn. 53, 71, N.W. 819 (1897).....26

Keys v. Minn. And St. Louis Railway, 36 Minn. 290, 30 N.W. 888 (1886).....26

State v. Sutton, 63 Minn. 14765 NW 262 30 ALR 660.....18

Thompson v. Town of Berlin, 87 Minn. 7, 91 N.W. 25 (1902).....30

TABLE OF AUTHORITIES-Continued

Page

Victor Co. v. State, 186 N.W. 2d 168 Minn. 1971.....31

Woodruff v. Town of Glendale, 26 Minn. 78, 1 N.W. 581 (1879).....30

CONSTITUTION

U.S. Const. amend V.....2, 4, 17, 33, 34, 36, 41

U.S. Const. amend XIV.....2, 4, 17, 33, 34, 36, 41

FEDERAL LAW

Public Law 91-646 the Uniform Relocation And Assistance and Real Property Acquisition Policies Act of 1970.....17, 37, 38, 41

MINNESOTA STATE CONSTITUTION

Article I:

Article I Section VII..... 33, 35

Article I Section VIII..... 34, 35

Article I Section XIII..... 33, 34, 35

TABLE OF AUTHORITIES-Continued

Page

STATUTES

MS 117.50 Eminent Domain Relocation Assistance Definitions.....38

MS 117.51 Cooperation with Federal Authorities.....38

MS 117.52 Uniform Relocation & Assistance....38

MS 117.53 Authorization.....38

MS 117.54 thru MS 117.56.....38

MS 160.02 Definition Town Road.....33

MS 117.045 Compelling Acquisitions in Certain Cases.....38

MS 160.05 Dedication of Roads.....16, 19, 40

MS 160.085 Recording Proposed Acquisition.....30

MS 160.04 Width of Roads.....23, 24, 29

MS 160.14 Marking Boundaries of Highways 21, 30

MS 162.081 Town Road Account.....21, 22, 29

MS 164.02 Town Roads (Establishment and Acquisition).....31

MS 164.06 Powers Regarding Town Roads.....24

TABLE OF AUTHORITIES – Continued

Page

MS 164.07 Establishment, Alteration of Vacation of Town Road.....19, 20, 22, 23, 24, 29

MS 164.35 Alternate Recording of Town Roads.....20, 23, 24, 29

MS 164.36 Town Authority Over Recorded Road.....22, 24

MS 505.31 Entry Upon Land Notice.....29

MS 117.095 (Eminent Domain Repealed).....38

OTHER

Op. Atty. Gen, 377-B-10K, Dec. 9, 1960.....24

Op. Atty. Gen, 1922, No. 399, p. 297.....25

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND ORDERS BELOW

The opinion of the highest state court to review the merits appears at Appendix **A** to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided our case was **July 15, 2008.** A copy of that decision appears at Appendix **A.** The jurisdiction of this Court evoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person shall....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Fourteenth Amendment to the U.S. Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioners' case arose on November 14, 2003 when the Respondents in the employment of Leslie Township in Todd County, Minnesota, entered the

Petitioners' property with heavy machinery and chain sawed one hundred and thirty five trees without giving Petitioners statutory notice and denying the Petitioners their constitutional rights to "due process of law." Respondents do not deny failure to give notice. Respondents do not deny the chain sawing of one hundred and thirty five trees.

Since the onset of Petitioners' case there has been a deprivation of Petitioners' rights, as well as a history of intimidation and oppression. On the same day the trees were chain sawed, another township official came on the Petitioners' property and threatened to take out their fence if Petitioners objected. (App. G, 51) (lines 20-25.) There have been continuous problems regarding evidence in this case. The Respondents noted in the Trial Memoranda, that the county ordered the chain sawing of the trees. The Petitioners immediately contacted the County. The county engineer left a message on the Petitioners' answering machine, saying: "anything the Township did they did on their own." The Petitioners delivered the tape to their attorney, Mrs. Clark, to be used as evidence at trial. The tape

remained on the desk in front of Petitioners' attorney at trial. The Petitioners' request that it be delivered into evidence was ignored. The Respondents stated that Todd County had a problem with the trees; however, this statement was not supported by any direct testimony in the transcript. The Petitioners contacted the Long Prairie sheriff and reported the damage to their property, after talking to the county engineer. (App. G, 52.)

During the course of the case, the Petitioners located an instrument recorded against their property and recorded against their Legal Abstract. The Petitioners' Legal Abstract dates back to the 1800's. The Township recorded and certified, an "invalid" instrument containing false information at the Todd County Recorder's Office. The recorded instrument placed a sixty-six foot (four rod) road through the Petitioners' property. (App. G, 56.) Again, the township did not provide the Petitioners statutory notice and denied Petitioner(s) their U.S. and Minnesota Constitutional rights to "due process of law"; and denied Petitioner(s) their Constitutional right to not have "private property taken for public

use without just compensation." The recorded instrument stated "platted 1984" and attested to a "duly" (legally or properly), "established centerline for a sixty-six foot wide road through the Petitioners' property. (Court Exhibit #17.) Petitioners' property was never platted. The Petitioners were never notified of a legal "centerline" survey being performed on their property. The description of the recorded road on the Petitioners' property is on page 15 of the recorded and certified Instrument #340895 which is Court Exhibit #16 &17, also App. G, 55.) The road on Petitioners' property is described in Court Exhibit #16 &17 under: "Township Road T597 (aka. Bambi Trail) (App. G, 55.)

The Petitioner purchased five acres in 1979 on a Contract for Deed. (Exhibit A of Court Filed Summons and Complaint.) In the 1970's Leslie Township constructed a primitive road without establishing it as a town road or cart way. No evidence was introduced at trial supporting the road being built with plans or specifications, nor was any evidence introduced of a properly filed road order with the county auditor, or even evidence that the

construction was opened for bids. Petitioner testified during the trial that there were no culverts or ditches built along Petitioners' property. (TT pg 27 lines 2-3.) The township 911 address signs are also along the 1960 platted road and not along the township's claimed easement on Petitioners' property. (TT pg. 131, lines 5-10.)

The original road "Bambi Trail" (Gateway Drive) was platted in 1960 at fifty feet wide along Little Osakis Lake, and the fifty foot wide road became a twenty-six foot wide road continuing along the section line on this plat and was "dedicated to the public forever." (App. G, 59.) This original Bambi Trail did not go through the Petitioners' property whatsoever. The Petitioners' property was never dedicated, gifted, or platted, nor was there an eminent domain procedure initiated against it by Leslie Township. In 1981, Little Osakis Acres Plat was established. Bambi Trail remained unchanged and remained platted along the section line and not through the Petitioners' property on this recorded plat. (App. G, 63.) The Petitioner was not given notice of the platting of Little Osakis Acres even

though the west line of Petitioners' property was lot seven's boundary line of this plat. (App. G, 124.)

The Petitioner(s) was not given notice of the vacating of a portion of the original 1960 platted road. The portion of this road, which was vacated, was in 1984. (App. F, 44.)

The Petitioners' attorney failed to file the Summons and Complaint efficiently. This wasn't filed until one and half years after the trees were cut down. The Petitioners sued the Respondents for damages and trespass. The Petitioners hired NorthStar Surveying to do a personal survey of their property April 2004, and requested that NorthStar Surveying point out the private easement for "ingress and egress" which is described in the legal description of Petitioners' deed to their property. Northstar Surveying provided a certificate of survey illustrating the correct placement of the easement on the Petitioners' west line. (App. G, 65.) Northstar Surveying also noted on this survey that "the centerline of the town road was not determined, and the survey did not determine what the Petitioners owned." Petitioners hired Engelmeyer Surveying for

another opinion. This survey is different than NorthStar's and fails to illustrate the easement on Petitioners' west line. (App. G, 68.) The employee of Engelmeyer Surveying, while in the Petitioners' employment, told the Petitioner their easement was on their Northeast Line and that he would "testify to that in court and you would not win". (TT Pg 41, lines 1-5.) Petitioners wrote Mr. Engelmeyer regarding the incident. (App. G, 71.) Later the Petitioners learned that Mr. Engelmeyer was the previous Todd County Surveyor. His name also appears on the half section map, which contains Petitioners' property. This map was developed in 1983 and revised in 1990 and 1993; however, the mistake of a sixty-six foot road on and through the petitioners' property was never corrected. (App. G, 73 and Court Exhibit #2.)

The township sent three more people to the Petitioners' property without Petitioners' consent. Representatives sent by the township provided testimony of their opinions of the damage, the value of the Petitioners' property, and where a road easement should be placed. The Petitioners were

disturbed over what they perceived as further intimidation and oppression by the township. The Petitioners hired their own experts (foresters, appraiser, and surveyor). These experts also testified at trial. The Petitioners were forced to mediate with the defendants who cut down their trees, even though the defendants had executed an unlawful act.

The case was set for a jury trial. Before the trial began on August 4th, 2006, the Petitioners discovered that the recorded and certified Leslie Township Resolution to Record Town Roads #340895 did not meet additional statutory requirements and was recorded well after the time frame allowed by law. (MS 164.35, Subd 4.) Petitioners' attorney wrote a letter to the Court at the request of the Petitioners on August 6, 2006 regarding addressing these deficiencies. (App. G, 74.)

The Petitioners' attorney told them that they "were opening a can of worms." There were numerous irregularities, which contribute to the unjust actions:

- The jury was dismissed the morning of the trial. The Petitioners were not given an explanation, even though there were many facts yet to be determined. Petitioners were not afforded an opportunity to have the facts determined by the jury.
- A motion for Summary Judgment was not requested by either party.
- Before the second day of the trial began the Petitioners' attorney stated: "I know your honor, you told us to make it quick."
- After three years of Petitioners providing every possible piece of evidence, the Petitioners' attorney stated the morning of the trial, "**I do not have all my exhibits with me at this time, I left them at the office.**" (TT Pg 20 lines 3-4.) However, the Petitioner and their attorney's husband carried in boxes of evidence, placing them under the desk at trial. When Petitioners asked their attorney, Mrs. Clark, if the judge "would get to see any of it", the Petitioners were told "don't worry he will see them."

- One piece of evidence was taken home by a witness for the Respondents and was mailed back to the Judge. (App. G, 78.)
- During the trial Respondents presented photo evidence, which was not provided to the Petitioners in discovery. In fact, the Respondents refused to answer a single Interrogatory or produce a single document stating, "they were untimely." (App. G, 80.)
- The important Northstar Surveying Certificate (Exhibit 1 of the Court Exhibits), failed to be mentioned on the Petitioner's filed List of Court Exhibits with the court, even though this exhibit was provided to the Petitioners' attorney months prior. The Petitioners had to search for this survey in the boxes under the desk at trial, eventually pushing it in front of their attorney, Mrs. Clark, during the trial. This certificate, which illustrated the exact placement of the west easement on the Petitioners' property as it was described on their deed's legal description, was marked as evidence during the trial and received by the Court. (Exhibit A of Court filed Summons and Complaint.)

- A clean copy provided by the Respondents apparently did not make it in the court file. (TT pg 20 lines 6 thru 18) also (Court Exhibit 1.)
- The evidence of the large septic mound and Planning and Zoning notes regarding the township's permission to put septic pipes under the old un-vacated portion of the platted road installed in 2005 (although also provided to counsel), did not make it into evidence. (App. G, 91.) The photos depict the septic mound which is almost seven feet high and seventy feet long and is a direct contradiction to the township's need to widen the alleged road through Petitioners' property. This was listed on the List of Exhibits for Trial filed with the Court. (App. G, 94.)
- The District Court Judge allowed the Respondents' counsel to take back exhibits of tree stump evidence at the end of the trial. (TT pg 166, lines 1 thru 8.)
- The District Court Judge arrived on the Petitioners' property after the trial and spoke with the Respondent, T. Berg, without Respondent being

under oath, and without objection from Petitioners' counsel. (TT pg. 165 lines 12 thru 19.)

- Petitioners supplied a plethora of documents to their counsel. Many of these were marked by the Respondents' counsel and used to question the Petitioner for over two hours in the deposition. (Theusch Deposition filed with Court.) The Respondents' counsel intimidated the Petitioner during the deposition. (TT pg 26 lines, 10 thru 16.)
- Although there was no jury present, there were many sustained objections in favor of the Respondents.
- The Petitioners' attorney did not challenge testimony.
- The Petitioners were told their important witnesses "did not want to testify," these included the Township Clerk, the current Todd County Surveyor, Northstar Surveyor, and the Sheriff' Deputy.
- A pretrial order denying the Respondents' Motion in Limine regarding suppressing "notice" was not presented for signing until four months **after** the trial.. (App. E, 42.)

- The video trial deposition of R. Engelmeyer, the previous Todd County Surveyor, taken on August 4, 2006 (App. G, 96), was delivered into evidence to the Court on August 9, 2006. (TT pg 92, lines 16 thru 25.) However, the trial deposition was not played, read, nor referenced during the trial. This testimony contained important information regarding Petitioners' property and the unlawful road on it, as well as questioning how a "50 foot road became a 66 foot road as it entered onto the Petitioners' property." (Engelmeyer Trial Deposition, pg 22, lines 2 thru 7) and (TT pg 25. lines 16 thru 20.)
- Respondents' second Motion in Limine addressed a request from Petitioners for emotional damages. Petitioners never requested emotional damages.
- The Petitioners' twenty-six page trial memoranda, which their counsel prepared for the District Court in making its decision has written on its face, "Void W W". (App. G, 99.) Petitioners were not aware if there was an error in format, or whether the document explaining their case was voided.

- There were additional problems with evidence during the trial. Evidence was not marked ahead of time, and in addition, some were retracted. (TT pg 129, lines ll-21), (TT pg 92, lines 8-17), (TT pg 96, lines5-8.)
- Although the Court stated at the end of the second day of the trial, "We have a situation here where there has not been notice to the plaintiffs, and I want to know your interpretation of what the consequences of that ought to be?" (TT pg 164, lines 1 thru 10); the October 4th, 2006 Order for Judgment ordered the Petitioners to pay $8,476.56 to the Respondents for Respondents costs and disbursements, while the Petitioners' claims were dismissed with prejudice. (App. G, 100.)
- Counsel failed to inform Petitioners she was running for Todd County Attorney, thus creating a possible conflict of interest. Petitioners discovered this shortly before the District Court Trial.
- Respondents' counsel objected to testimony of the Petitioners' expert witness (U of M Instructor/Forester) even before their expert witness had an opportunity to speak. (TT pg 96,

lines 9 thru 19.) It is not clear to the Petitioners if the expert testimony and resume were considered. (App. G, 104.)

The Petitioners brought forth a Motion for Amended Findings. The February 15, 2007 District Court Order awarded the Petitioners fifty six hundred dollars and their other claims were dismissed with prejudice.

Petitioners appealed damages and road issues to the Minnesota State Appeals Court. The pre-paid attorney refused to do the oral argument and withdrew. (App. G, 109.) No explanation was given to the Petitioners. The tree issue was remanded back to District Court and the Petitioners were denied damages for their property being unlawfully taken for a recorded road and were barred under statute of limitations in MS 160.05.

Petitioners pre-paid yet another attorney to do a Petition for Review to the Minnesota Supreme Court. Petitioners pleaded with the new attorney to write in the petition that there was a violation of Petitioners' Constitutional Rights and violation of the Federal Uniform Act, specifically. Petitioners request for

review was denied. Counsel, Mr. Mack, told the Petitioners he would take the case to the U.S. Supreme Court for free; however, counsel also told the Petitioners they "must go to District Court first. The Petitioners discovered, early in October, that the Writ of Certiorari had to be submitted by mid October. Once again, Petitioners were deprived of their rights. Utilizing the Statute of Limitations in MS 160.05 and barring rights to damages for the unlawful taking of Petitioners' property on the invalid recorded instrument is not consistent with the "due process" and "just compensation" clauses of the 5th and 14th Amendments to the U.S. Constitution, and is not consistent with the Federal Uniform and Relocation Assistance Policies Act of 1970. Local laws that run contrary to the U.S. Constitution should be null and void.

REASONS FOR GRANTING THE PETITION

"When any court violates the clean and unambiguous language of the Constitution, a fraud is

perpetrated and no one is bound to obey it "*State v. Sutton,* 63 Minn. 147 65 NW 262 30 ALR 660, also , *Watson v. Memphis,* 375 U.S. 526; 10 L Ed 529; 83 S. Ct. 1414. The experience of the past five years litigating in the U.S. Judicial system has been beyond unfair; it has been a mockery of "equal justice under law." Irregularities and reasons for an appellant discretionary review are referenced throughout the Statement of the Case. When a government entity records a false instrument against real private property in a public office without notice to the rightful land owners, and then enters the same private property without notice and destroys property that does not belong to them by chain sawing trees, and thereby further intimidating and oppressing the victims by sending people to their property to belittle the damage and belittle the very home they live in, threaten them, and instead of receiving justice in the judicial system the Petitioners were ordered to pay the Respondents costs and disbursements; without regard to the Petitioners' civil and constitutional rights, making it necessary for them to further litigate; such

occurrences are beyond unfair, they are a serious deprivation of basic constitutional and civil rights.

The Minnesota Appellant Court ruled that the Petitioners are barred from receiving damages for their property that was taken for public use. It was ruled that the statute of limitations of MS 160.05 barred Petitioners from seeking damages for the government taking. Petitioners respectfully disagree. Laws are on the books to properly and lawfully establish and record town roads.

In 1973 Minnesota town roads were required by law to be "lawfully" recorded.

> (a) The order establishing, altering, or vacating any road **shall be recorded** by the town clerk, and a copy thereof certified as true and correct by the town clerk shall be forthwith recorded with the county recorder or registrar of titles of the county within which the land and premises are located. The certified copy of the order shall be first presented to the county auditor who shall enter the same in the transfer records and note upon the certified copy over the auditor's

official signature, the words "entered in the transfer record."

(b) The order or a certified copy shall be received in all courts as competent evidence of the facts therein...."(MS 164.07, Subd. 11.)

MS 164.07 requires town roads be lawfully recorded. (Laws of Minnesota 1973 Chapter 24-S.F. No 62.)

Prescriptive easements were abolished when it became law for townships to lawfully record their town road easements (MS 164.07, Subd. 11), because more accurate road inventories were needed by the County Auditor to be used in preparation for the annual financial report. Resolutions were required, to be adopted by law and required the date and circumstance of each acquisition. Leslie Township chose to record each acquisition according to the formal Alternate Recording Method for town roads as outlined in MS 164.35 using the Map Procedure. However, Leslie Township failed to conform to the requirements in MS 164.35 in recording its alleged Township roads. (Letter to the District Court Judge

dated August 6, 2006 (App. G, 74), and (Court Trial Exhibit #17.)

Respondents do not dispute Leslie Township failed to comply with Minnesota Statutes 164.35. (App. A, 19 (footnotes.) Minnesota Statutes also require boundaries to be marked regarding establishing the width of the acquisition. (MS 160.14.) No boundaries were lawfully marked on Petitioners' property or the adjoining property for the alleged sixty- six foot recorded town road.

A report prepared for the Minnesota Department of Transportation entitled "Proposal for Alternate Method to Record Town Roads/Town Road Study," dated June 27, 1986 states: "According to current law, township road orders relating to establishment, vacation and alteration of a road "must" be filed with the County Recorder." (App. G, 111 .)

The Town Road Account created in the County State Aid to Highway Fund is also significant, because the township receives funding for construction, reconstruction and maintenance for its town roads.

Since, "the town road account is created in the County State Aid to Highway Fund," (MS 162.081, Sub. l); money distributed to a town under this subdivision may be expended by the town only for construction, reconstruction and gravel "maintenance" of town roads within the town. (MS 162.081, Sub. 4.) "Funds in the Town Road Account must be apportioned to each county so that each county receives the percentage that the total miles of town roads in the county bears to the total miles of town roads in the state". (MS 162.081,Subd. 2.) MS 162.081 allows for funding for road maintenance. The Township receives funding (gas tax) based on "maintenance miles" turned into the county engineer annually. Leslie Township has been certifying its maintenance miles for funding from the Town Road Account years prior to recording its town roads and years before the road on Petitioners' property was recorded. (App. G, 114.) "The town board has authority within the sixty-six foot right of way to 1) maintain or reconstruct a "recorded" road used for vehicular travel." (MS 164.36.)

This statute does not address giving the township a legal right to maintain a "prescriptive easement." The road on Petitioners' property was recorded at 66 feet wide: "To the extent this section requires recording or dedicating a town road to a width greater than that of it previous, actual public use, Section 164.07 governs any award or procedures relating to damages sustained, if any, by the property owner." (MS 164.35, Subd. 4g.) Town roads are required by law to be lawfully recorded (MS 164.07, Sub. 11) and roads are required to be four rods (sixty-six) feet wide. (MS 160.04.) Therefore, utilizing a prescriptive easement for a town road which has been receiving funding from the Town Road Account, and which was required by law to be, lawfully recorded is not valid.

> Except as otherwise provided, all roads here after established, except cart ways shall be at "least" four rods wide. Additional right-of-way and easements, including easements needed for drainage, may be acquired by purchase, gift, or eminent domain proceedings when necessary for construction, "maintenance",

safety, or convenient public travel." (1959) (MS 160.04.)

Since, it is required by law for town roads to be lawfully recorded at four rods wide and since towns have "authority over a "recorded road," and the town board has authority within the sixty-six foot right-of-way to: "maintain or reconstruct a **recorded** road used for vehicular travel" (MS 164.36 (1), township roads must be recorded properly at sixty-six feet wide. (MS 160.04.) Additional necessary right of ways may be acquired by eminent domain proceedings: "If, after a town establishes a road under the provisions of MS 164.06 and MS 164.07, the board has the authority to acquire the necessary right of way thereof by purchase, gift or eminent domain proceedings." *Op. Atty. Gen.* 377-B-10-K, Dec. 9, 1960.

Neither the Petitioners, nor the owners of the adjoining one-third acre property whose boundary line is Petitioners' Northeast property line, gave a right of way to the township. The township did not purchase the Petitioners' property, or the adjoining neighbors' property. The township has never

initiated a formal eminent domain procedure. A Township road was simply never established legally on Petitioners' property. Because Leslie Township chose to record its roads formally by "Resolution," the township cannot fall back on the claim that they have maintained the road thereby creating a township road. Further more, the adjoining one-third acre is private property, and there is not an easement on this property's legal description dedicating a right of way to the Respondents. (Exhibits B of Court filed Summons and Complaint.)

"Where no petition for establishment of a township road was {made} and no township records show the legal establishment of the road, the presumption is that the premises were never designated as a township road." *Op Atty. Gen.* 1922. No. 399. P. 297

Because a sixty-six foot "township road" through the Petitioners' property was established in the Township Resolution of Road Easements – Instrument #340895, (Court Exhibit 17), by the Township officers on July 31, 1990 and recorded in the Todd County Recorder Office February 12, 1991;

and the township did not follow the proper statutory procedures to establish that resolution (MS 164.35), the portion of the road on Petitioners' property is not a town road and the township does not have a legal right of way. "A road cannot be established or vacated without an order signed by the board. Such order must be complete and sufficient on its face and its defects cannot be supplied by parole evidence" *Keys v. Minneapolis and St. Louis Railway* 36 Minn. 290, 30 N.W. 888 (1886); See *Banse v. Town of Clark* 69 Minn. 53, 71, N.W. 819 (1897.)

The Petitioners' Abstract for Deed (legal title) includes farmland up to the section line. (App. G, 116.) There is no documentation in the Petitioners' Legal Abstract regarding any sale of the "cut off" of one third acre from the NW corner of the original five acre lot, nor is there documentation of a road ever being built on the Petitioners' property. The Petitioners' Legal Abstract goes back to the 1800's. The Petitioners were the "bonafide" owners of the original "five acre" lot which is located in Section 25 (App. G, 73), and they paid taxes on the full five acres. (App. G, 118.) The testimony of the Petitioner

regarding the road "forking", explains the placement of the original 1960 platted road. (TT pg 21 lines 1 thru 14.) Photos given to the Petitioners' attorneys to be used as evidence of the road forking through Petitioners' private property were listed in the filed list of Court Exhibits (# 24), but the attorney failed to deliver to the court this significant evidence, as well. (App. G, 119.) Culverts were not installed on Petitioners' property. Ditches were never constructed on Petitioners' property. Culverts were installed under the 1960 platted road, not the gravel on Petitioners' property. (App. G, 120.)

A survey certificate prepared by the Respondents' surveyor (K Deleo) which was included in the Petitioners" Appellant Brief index under App. #AA22, (Court Exhibit 27 also (App. G, 121), illustrates that the corner of the Northeast Line of Petitioners' property should be "25.97 feet" further west. This measurement, along with the testimony regarding the "87.51 foot" marker (near mail box) (TT pg 22, lines 2 thru 17), and the fact that the west line measures approximately seventy more feet which said measurement continues across the gravel,

places the accurate NE boundary line at the foot of the septic on the adjoining one-third acre and establishes the Petitioners' property extends past the existing gravel. (Engelmeyer's deposition testimony pg 18, lines 2 thru 25.)

The survey introduced at trial by the Respondents' witness (surveyor) fails to illustrate the boundary line of the adjoining one-third acre and does not illustrate the westerly easement along the Petitioners' west property line which is clearly depicted on Petitioners' personal survey certificate prepared by Northstar Surveying. The Respondents' survey appears to be a survey placing Petitioners' trees in a possible 50 or 66 foot right of way. (App . G, 122.) K. Deleo's survey was used in the Court to depict a "road" on the Petitioners' property; however, it lacks elements of a "legal" road survey. (Ex. of a portion of a legal road survey Exhibit 26 of Theusch Deposition.) The Respondents' surveyor admits he did not know the width of the road on Petitioners' property. (TT pg 142, lines 15 thru 25.)

The Respondents' surveyor entered the Petitioners' property unannounced, as indicated in

the transcript: "We did not call". (TT 144, lines 4 thru 8.)

"No surveyor may enter upon any land unless first notifying the owner". (MS 505.31.)

When the Petitioners hired their own surveyor, Northstar Surveying, illustrated the correct easement on the Petitioners' property which is along their 156 foot west line. (App. G, 66) and (Court Exhibit 1.)

Since funding from the Town Road Account is based on "maintenance" miles, and since town roads are created in the County State Aid to Highway Fund (MS 162.081) and receive funds for maintenance; and since the law requires town roads be lawfully recorded (MS 164.07, Subd. 11), at 66 feet (four rods) wide (MS 160.04), and since towns have authority to maintain **recorded** roads (MS 164.36), and since the township turns in its maintenance miles annually for its allotment from the Town Road Account (App. G, 114), claiming a prescriptive easement after the fact is illogical. Leslie Township was required to conform to the Alternate Road Recording procedure outlined in MS 164.35, which

requires "notice" when the town roads were recorded. (MS 164.35 Sub. 4c.)

If a legal and proper centerline had been established for the recorded road as was claimed in the certified instrument #340895, boundary lines may have been precisely marked according to law. (MS 160.14.) However, they were not. A licensed surveyor in the "employ of the County" would have "certified" the accuracy of the recorded map. (MS 160.085 Sub 1c.)

Petitioners must receive notice of the road being recorded on their property:

"Personal service of the notice of hearing on a petition to establish a town road "must" be made on each occupant of the land which the proposed road will pass; i.e. upon the person having the actual possession and control of the land." *Thompson v Town of Berlin,* 87 Minn. 7, 91 N.W. 25 (1902)

Petitioners are entitled to damages for the taking of their property for a road:

"Towns are liable for damages assessed to owners whose lands are taken for town roads." *Woodruff v. Town of Glendale,* 26 Minn. 78, 1 N.W. 581 (1879.)

Respondents chose MS 164.35, "Alternate Road Recording", to formally record their alleged town roads; however, they did not conform to the statutes. Petitioners' property was taken unlawfully without just compensation.

"These provisions have been interpreted to mean that property owners must receive the full diminution in the market value of their property occasioned by a taking." *Victor Co. v. State*, 186 N.W. 2d 168 (Minn. 1971.)

By law, the portion of the road, which travels through the Petitioners' property, is not a town road: "Town roads shall be established, located, relocated, constructed, reconstructed, improved and maintained, or vacated by the several towns. (MS 164.02 Sub. 1.) "Acquisition: "They may acquire by purchase, gift, or eminent domain proceedings as provided by law all necessary right of way for such roads...." (MS 164.02 Sub. 2.)

Laws, which are clearly established laws, must be enforced. Denial of fundamental rights to substantive, as well, as procedural due process, and denial of equal protection under the laws, runs

contrary to "due process of law" clauses as indicated in the U.S. Constitutional Amendments.

"It is the duty of the courts to be watchful for Constitutional right violations of the citizens, against any stealthy encroachments thereby." *Boyd v. U.S.*, 116, U.S. 616, 635, (1885.)

In Respondents' second pretrial Motion in Limine dated July 24, 2006, the Respondents' attorney stated:

"Since there is no civil penalty for failing to give notice, the fact Leslie Township failed to provide notice is irrelevant and any evidence pertaining to its failure to give notice should be suppressed" (Court Filed Respondents' Motion in Limine.)

Evidence has been suppressed throughout Petitioners' case. Failure to give proper notice denied Petitioners of their Constitutional Rights to "due process of law."

Even by "definition" Petitioners' property is not a town road:

> "Town roads" includes those roads which have heretofore been or which here to after may be established, constructed, or improved under

> the authority of the several town boards, roads established, constructed, or improved by counties that have been maintained by the towns for a period of a least one year prior to July l, 1957". (MS 160.02, Sub. 28.)

The earliest date brought up in the trial when the town road was possibly constructed was in the 1970's. (TT p 159, line 19.)

The Petitioners are not the only people to bring forth the question of violation of their Constitutional rights. The Petitioners' attorney, Mrs. Callies, who appealed the District Court decision to the Minnesota Appeals Court pointed out the Petitioners' rights under the Minnesota Constitution Article l "Bill of Rights." The Petitioners' Appellant Brief states:

"Both the United States Constitution and the Minnesota Constitution prohibit the taking of private property without due process and without paying just compensation to the owner. U.S. Const. Amends. 5 and 14; and Minn. Const. Art. I Sec. 7 and 13." (Petitioner's Appellant's Brief pg. 15 under B.)

Violation of Petitioners' Constitutional rights was addressed in the post trial memoranda filed in District Court September 08, 2006 by Mrs. Clark, which states:

"the (plaintiffs' constitutional right to due process was violated and property taken without just compensation" (pg. 17, lines 8-10.)

"Plaintiffs' Constitutional rights were violated." (pg 20, line 15-16) Leslie Township took the property of (plaintiff) without notice, without providing her (plaintiff) an opportunity to be heard and without just compensation."

Petitioners' "Petition for Review" to the State of Minnesota Supreme Court references the "Minnesota Constitution Article I Sec. 8 and stated:

"Every person is entitled to a certain remedy in the law for all injuries or wrongs which he may receive to his person, property, or character."

The Respondents' counsel noted there were references in the case regarding violation of constitutional rights:

"there were constant remarks and references to violations of due process and unconstitutional taking." (TT pg 9 lines 14-15)

The three Sections of the Minnesota Constitution Article I, which are referenced in the Petitioners' Appellant Brief, in relevant parts states:

- Sec. 7 "Due process...No person shall be.....deprived of life, liberty or property without due process of law"
- Sec. 8 "Redress of injuries and wrongs. Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive to his person, property or character, and to obtain justice freely and without purchase, completely without denial, promptly delay, conformable to the laws."
- Sec. 13 "Private property for public use. Private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid and secured."

The Minnesota Constitution protected the Petitioners' due process rights to a prompt and speedy trial conformable to the laws and

compensation guaranteed for property damage for public use, yet the Petitioners were not afforded these protections as guaranteed by the Minnesota Constitution.

The U.S. Constitution also guarantees Petitioners property rights and civil rights. The U.S. Constitutional Amendment 14, in relevant part states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law nor, deny any person in its jurisdiction equal protection under the law

In order to have equal protection under the law the rule of law needs to be followed. Established laws cannot be ignored.

The U.S. Constitutional Amendment Five, in relevant part states: "nor shall any person be deprived, of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

On January 2, 1971, Public Law 91-646, the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act), was signed into law. This law was enacted by Congress to ensure that people whose real property is acquired, or who move as a result of projects receiving Federal funding, will be treated "fairly and equitably" and will receive assistance in moving from the property they occupy. This act requires that, when property is to be acquired, each owner should be notified in such a way that an administrative record exists to attest to the delivery to the owner. There is no assurance when using public meeting that all affected owners will be present and each owner is due the courtesy of receiving a timely notice of the agency's intent. Notice should be provided as early as possible, when it is known a property interest will be acquired, and no later than when the appraisal valuation assignments are made. (Chapter 24 of the Uniform Act addresses acquiring lawful acquisitions of private property.)

In 1973 the State of Minnesota passed a compliance act relating to eminent domain; providing

for uniform relocation assistance, service, payments and benefits for displaced persons; repealing Minnesota Statutes 1971, Section 117.095.

The State of Minnesota passed eminent domain laws MS 117.50 through MS 117.56 in compliance with the "Uniform Act." Yet the Township failed to apply these statutes when acquiring the 66 foot wide town road on Petitioners' property. Minnesota Law also allows an action compelling an Acquiring Authority to initiate eminent domain proceedings, which was omitted from a current or completed eminent domain proceedings. (MS 117.045.)

Property taken for public use causes a deprivation of citizens rights who are without recourse for such actions. For this reason courts need to guard against violation of Constitutional and Civil Rights.

Although, the State of Minnesota passed a compliance act complying with the Federal Uniform Act, Petitioners were still denied protection under these laws and the fact Petitioners' private property was acquired on an invalid instrument by an "Acquiring Authority" which had the "power of eminent domain", required that established eminent

domain laws should have been followed by that acquiring Authority. No action was taken to enact the eminent domain process by the Township. Instead, Petitioners' property was taken without notice on an invalid instrument.

Petitioners, although having hired legal counsel, were not counseled regarding eminent domain, and have also been denied any protection they may have received if counsels had initiated an inverse condemnation action, an option that was also not afforded them. The Petitioners' U.S. Constitutional and Minnesota Constitutional and Civil Rights have been violated.

CONCLUSION

"As long as a defendant who abridges a plaintiff's constitutional rights acts pursuant to a statute of local law which empowers him to commit the wrongful act, an action under the Federal Civil Rights statute is established." 42 U.S.C.A 1981 et seq. *Laverne v. Corning.* 316 F. supp. 629.

The Petitioners' property was taken from them without notice, on an invalid instrument, filed and recorded in a public office by a public official, and then damaged without notice. The Petitioners were denied "due process of law" and "denied protection under the law" resulting in a serious deprivation of their rights. An invalid statute of local law (MS 160.05) empowered the Respondents to take and damage Petitioners' property lawlessly. Because real private property was taken from the Petitioners unlawfully with no way to impede such action, the taking should not be rewarded.

"In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Butz v. Economou,* 438 U.S. 506, 98 S. Ct. 2910 (1978.)

> (Plaintiffs' Note: or "good faith") would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the {plaintiff}, or if he took the action with the malicious intention to cause a deprivation of

constitutional rights or other injury... *Harlow v. Fitzgerald,* 102 S. Ct. 2727 at 2737, 457 U.S. 800.

A sixty-six foot road was intentionally recorded, without notice, on an invalid instrument (#340895) filed and certified in a public office by a public official against Petitioners' Legal Abstract (Court Exhibits 16 and 17, App. G, 55), falsely attesting to a "duly" established centerline for a sixty-six foot town road easement; thus disregarding applicable law for establishing and recording a legal town road. The Petitioners had no recourse to stop this unlawful taking of their private property. Petitioners received no just compensation for the taking. This unlawful taking denied plaintiffs of their Constitutional rights to "due process of law" and "just compensation" provided by the 5th and 14th Amendments and "denied them of the "fair and equitable treatment", envisioned in the Federal Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970.

Petitioners respectfully request, that the private property taken falsely and unlawfully be rescinded

back to them, however, if the court deems damages under eminent domain laws appropriate, that interest be paid to the Petitioners accruing from the date of the unlawful taking, and respectfully request Petitioners be reimbursed for attorney fees, cost and disbursements; and/or whatever the Supreme Court of the United States deems just.

Respectfully submitted,

RICHARD AND SHARON THEUSCH,
Pro Se Litigants
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Osakis, Minnesota 56360
320-732-3094

APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS

RICHARD THEUSCH, et. al.,	)	A 07-848
Appellant,	)	
v.	)	**OPINION**
TAD BERG, et al.,	)	(Filed May 6, 2008)
Respondents.	)	

Appeal from the Todd County District Court
File No. 77-C-3-05-000492
The Honorable William Walker, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Richard and Sharon Theusch
(Pro Se Appellants)

Gordon H. Hansmeier, Gregory J. Haupert,
Rajkowski Hansmeier Ltd.
Attorneys for Appellee

WILLIS, Judge

In this appeal from a judgment in a bench trial, appellants argue that the district court erred by concluding that certain of their claims are time-barred and that the district court's computation of damages on another claim is not supported by the evidence and is the result of error of law. By notice of review, respondents challenge the district court's award of damages. We affirm in part, reverse in part, and remand.

FACTS

Pro se appellants Richard and Sharon Theusch own property in Todd County, Gateway

Drive,[1] a township road, forms the northwestern boundary of the Theusches' property. In 1990, respondent Leslie Township held a public hearing on a resolution to record the township's easements for "township roads and road right-of-way." The township mailed notices of the hearing to affected property owners, but the Theusches were not on the mailing list, and, thus, did not receive notice of the hearing. The resolution proposed establishing a right-of-way for Gateway Drive that extended 25 feet to either side of its centerline. The township passed the resolution in July 1990, and it was recorded with the Todd County Recorder in February 1991. In the fall of 2003, Todd County, which contracts with the

[1] At some point during the road's existence, Gateway Drive was known as Bambi Trail. Throughout the record and in the parties' briefs, the road is at times referred to as Gateway Drive and at other times Bambi Trail. For convenience, we will formally use Gateway Drive.

township for snowplowing on Gateway Drive, requested that the township clear "some of the brush and overhanging branches" along the edge of Gateway Drive because they were interfering with the county's snowplows. The township hired respondents Tad and Everett Berg to do the work that the county had requested, and on November 14, 2003, the Bergs removed approximately 135 trees from a portion of the Theusches' property that was within 25 feet of Gateway Drive's centerline. The township gave no notice to the Theusches of its plan to remove the trees.

On July 11, 2005, the Theusches filed a complaint against the respondents, asserting claims of (1) trespass to their property, (2) the unlawful removal of trees, (3) failure to give the required statutory notice of the removal of trees, and (4) compensation for a taking of their real property. Following a bench

trial, the district court dismissed all of the Theusch's claims on the ground that they are time-barred. The Theusches moved for amended findings, and the district court issued amended and restated findings of fact, conclusions of law, and order for judgment, reaffirming its ruling that the Theusches' claims of trespass and compensation for a taking of their real property are time-barred but concluding that the Theusches were entitled to $5,600 on their claim for damages resulting from the township's failure to give them notice that it was going to cut down the trees, as required by Minn. Stat. 160.22, subd. 5 (2006). This appeal follows.

DECISION

On appeal from a judgment following a bench trial, this court's scope of review is confined to determining whether the district court's findings are clearly erroneous and whether it erred in its conclusions of law. *Schweich v. Ziegler, Inc.*, 463 N.

W.2d 722, 729 (Minn. 1990); *Foster v. Bergstrom*, 515 N.W.2d 581, 585 (Minn. App. 1994). This court will affirm the district court's findings if they are "reasonably supported by the evidence as a whole, or not manifestly contrary to the weight of the evidence." *Foster*, 515 N.W.2d at 585.

I. The district court did not err by concluding that certain of the Theusches' claims are time-barred.

The district court determined that Gateway Drive, which includes its supporting slopes and structures, had been established as a public road through statutory dedication under Minn. Stat. 160.05, subd. 1 (2006). The Theusches argue that the district court erred in its application of the statute, claiming that (1) the district court's finding that there had been public use and maintenance of Gateway Drive for the required statutory period is

clearly erroneous and (2) the district court's determination of the width of the road exceeds the portion actually used by the public and maintained by a road authority.

Under section 160.05, subdivision 1:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

Dedication of a public road under this statutory provision requires (1) "use by public" and (2) "maintenance by an appropriate government agency," both of which must be shown to have occurred "over a continuous period of at least six

Years." *Foster,* 515 N.W. 2d at 585-86. The proponent of statutory dedication, here respondents, bears the burden of proof. *See Ravenna Twp. V. Grunseth,* 314 N.W.2d 214, 217 (Minn. 1981). And the standard of proof is a preponderance of the evidence. *Rixmann v. city of Prior Lake,* 723 N.W.2d 493, 496 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). The question of statutory dedication is one of fact, and this court will not reverse a district court's determination unless it is clearly erroneous. *Ravenna,* 314 N.W. 2d at 217. Further, this court views the evidence in the light most favorable to the district court's findings. *Id.*

A. The district court's findings that there has been public use and maintenance of Gateway Drive by a road authority for the required statutory period is not clearly erroneous.

The Theusches contend first that there was no evidence from which the district court could have made its finding that there has been public use and maintenance by a road authority of Gataeway Drive for longer than the required statutory period of six continuous years. As an initial matter, we note that the Theusches conceded to the district court that there has been public use and maintenance of Gateway Drive "in excess of six consecutive years, since the early 1970's to the present time." In fact, the finding that the Theusches challenge is identical with their own proposed finding in their motion for amended findings of fact. The fact that the Theusches agreed to a finding that is identical with the district court's finding places them in a difficult position to argue that the finding is clearly erroneous. But we nevertheless will address the claim that they

make on appeal.

Use by the public may be established if it is shown that even a comparatively small number of persons used the road for six years continuously. *Town of Belle Prairie v. Kliber*, 448 N.W.2d 375, 379 (Minn. App. 1989). The record shows that Sharon Theusch agreed at trial that the public has been "driving up and down {Gateway Drive) for years and years." Based on this evidence, we conclude that the district court's findings regarding public use for the required statutory period is not clearly erroneous.

We likewise conclude that the district court's finding regarding the maintenance requirement is not clearly erroneous. "To satisfy the maintenance requirement, the maintenance must be of a quality and character appropriate to an already existing public road." *Rixmann*,

723 N.W.2d at 496 (quotation omitted). The supreme court has explained that it is not necessary that every part of a road be worked on during the six years or even that some part of the road be worked on every year during the six years to establish statutory dedication. *Ravenna*, 314 N.W.2d at 217 (citing *Leeper v. Hampton Hills, Inc.*, 290 Minn. 143, 146, 187 N.W.2d 765, 767-68 (1971). Rather, "it is sufficient if maintenance if performed when necessary." *Rixmann*, 723 N.W.2d at 496; *see also Kliber*, 448 N.W.2d at 379-80 (holding that evidence that the township graded the road annually and that the township had "bills allowed for roadwork" was sufficient to satisfy the maintenance requirement). Here, the evidence shows that the township (1) arranged to have Gateway Drive graded and snowplowed,

(2) trimed trees along the road, (3) performed annual road inspections, and (4) "put[] gravel down where appropriate," and that all of these activities occurred over a period of more than six years.

The Theusches claim that there is no evidence to show that the maintenance activities on Gateway Drive were of a type "similar to that for other public roads." But courts have generally found that activities substantially similar to those here, when performed on more than one or two occasions, are sufficient to satisfy the maintenance requirement. *Compare Leeper,* 20 Minn. At 147, 187 N.W. 2d at 768 (concluding that evidence showing that during an eight-year period, a road had been plowed and graded and that weeds had been removed was sufficient),

And Kliber, 448 N.W.2d at 379-80 (concluding that evidence showing that a township would "drag the road and level it off" once or twice a year was sufficient), *with Ravenna,* 314 N.W.2d at 218 (concluding that the maintenance requirement had not been satisfied when there had been only one instance of maintenance during a 24-year period and no evidence of snowplowing), *and Foster,* 515 N.W.2d at 586 (affirming a finding that the maintenance requirement had not been satisfied when the evidence showed that the city, although it regularly plowed snow off the road, had spread gravel and "laid blacktop" on the road only once.

B. The district court's determination of the width of Gateway Drive does not exceed the width of actual use.

The Theusches challenge the district court's determination of the width of Gateway Drive for purposes of statutory dedication, arguing that the district court "did not determine the dedication according to the land actually used." The width of a road dedicated under section 160.05 is limited to the width of actual use." Minn. Stat. 160.05, subd. 1. A dedication beyond the width of actual use is an unconstitutional taking because it does not provide the landowner with notice of the adverse use by the public, which would allow the landowner to take action to bar users from the property. *Barfnecht v. Town Bd. Of Hollywood Twp.*, 304 Minn. 505m 508, 232 N.W.2d 420, 423 (1975). But the width is "not limited to that portion of the

that portion of the road actually traveled, it may include the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion." *Id.* at 509, 232 N.W.2d at 423.

The district court found that the dedication of Gateway Drive extended to the road's "supporting slopes and structure," which consists of 25 feet to either side of the centerline, and that the "down slope area...was a supporting part of Gateway Drive." The Theusches contend that the evidence is insufficient to support the district court's finding because there was no "engineering or other competent testimony" that the slopes actually support the roadway. We disagree that expert testimony was necessary to support the

District court's finding and find no error in the district court's determination of the width of Gateway Drive.

C. Section 160.05, subdivision 1, bars the Theusches' claims of trespass to land and an entitlement to compensation for a taking of their real property.

In applying Minn. Stat. 160.05, subd. 1 the provisions for statutory dedication of a public road, the Minnesota Supreme court has explained:

> Section 160.05 , subd 1, provides no method by which government can *take* property. The statute, rather, provides a substitute for the common-law creation of highways by prescriptive or adverse use. During the running of the six-year statute, the township and public are adverse users and, at any time during that period, the landowner

> may seek damages for trespass, he may bar users from the property or he may force the township, if he wishes to continue to use his property, to condemn it and pay compensation. After six years have passed, however, he is estopped from asserting those rights. The township and the public acquire rights not because tbey taken them, but because the landowner forfeits them by failing to act within the prescribed period.

Shinneman v. Arago Tp., 288 N.W.2d 39, 243 (Minn. 1980) (citation omitted); *see also Barfnecht*, 304 Minn. At 508, 232 N.W.2d at 423 ("The statute provides a statute of limitations, the running of which estops an owner from denying the existence of

a public easement.") An affected property owner, therefore, "has no complaint if his request for relief is held barred by long acquiescence and laches or by the running of a statute of limitations." *Shinneman*, 288 N.W.2d at 244.

Here, the record supports the district court's determination that there has been public use and maintenance of Gateway Drive by a road authority for longer than the required statutory period of six continuous years. The requirement for statutory dedication under section 160.05 has been satisfied and the required statutory period of six continuous years has passed. As a result, Gateway Drive, including its supporting slopes and structures, has been established as a public road. Accordingly, the Theusches are estopped from asserting a right to compensation for a taking, and the district court correctly concluded that their claim is barred by

Section 160.05. And because the removal of trees along Gateway Drive was limited to the property that had been established as a public road under section 160.05, the Theusches' trespass-to-land claim is likewise barred.[2]

II. The district court erred by concluding that the Theusches were entitled to damages for

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[2] The Theuschs also argue that the township's recording of Gateway Drive and the accompanying right-of-way in early 1991 is defective because the Theusches were not given notice of the public hearing that was held regarding the resolution to record the road and because the town-road map was recorded more than 90 days after it was passed. See Minn. Stat. 164.35, subd 4 (2006) (requiring that a township send notice of the hearing by mail to property owners who will be directly affected by the resolution if adopted and requiring that the township record the town-road map within 90 days after adopting the map). But whether the township failed to satisfy the requirements of section 164.35, subdivision 4, is irrelevant because Gateway Drive has been established as a public road by statutory dedication under section 160.05.

Leslie Township's violation of Minn. Stat. 160.22 (2006)

The district court concluded that although the removal of trees from the Theusches' property occurred with the township's right-of-way for Gateway Drive, they are "entitled to damages in the amount of $5,600 for diminution in value of their property as a result of {the township's} failure to provide notice," as required by Minn. Sate. 160.22. By notice of review, respondents challenge the district court's award of damages.

> Section 160.22 provides, in pertinent part: prior to ordering the cutting and removal of trees and hedges not acquired, the road authority shall fix a time and place of hearing...to consider the cutting and removal of such trees and hedges. The owners of the abutting land shall be given written notice of the hearing at least ten

days prior to the date fixed therefore. At the hearing the abuting owners shall be given the opportunity to be heard.

Trees, hedges and other shrubs or plants within the limits of any town road and not acquired by the town.....may be cut and removed.....when they interfere with the maintenance.....of the road or with the safety and convenience of the public; provided that the town gives written notice to the abutting owner of its intention to cut and remove 14 days before taking such action and the abutting owner does not request a hearing during that period. The notice shall plainly advise the abutting owner of the right to a hearing.

Minn. Stat. 160.22, subds. 5, 10 (2006). Respondents concede that the township's failure to give the Theusches notice violated section 160.22. They contend, however that there is no private cause of action for such a violation and that district court erred by awarding the Theusches damages. This is a question of statutory interpretation reviewed de novo. *Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985)

A statute does not give rise to a private cause of action unless "the language of the statue is explicit or it can be determined by clear implication." *Valakis v. Putnam*, 504 N.W. 2d 264, 266 (Minn. App. 1993). Principles of judicial restraint prevent courts from creating new statutory causes of action that do not exist at common law when the legislature has not provided for a private cause of action either by the express terms of a statute or by clear implication.

Becker v. Mayo Found., 737 N.W.2d 200, 207 (Minn. 2007). The express terms of section 160.22 make no provision for a private cause of action; therefore, the question is whether one is clearly implied.

In deciding whether a private cause of action can be clearly implied from a statute, Minnesota courts consider three factors (1) whether the plaintiff belongs to the class for whose benefit the statue was enacted, (2) whether the legislature indicated an intent to create or deny a remedy, and (3) whether implying a remedy would be consistent with the underlying purpose of the legislature enactment. *Flour Exch. Bldg. Corp. v. State,* 524 N.W.2d 496, 499 (Minn. App. 1994), *review denied* (Minn. Feb. 14, 1995).

The statute at issue requires that a township give notice to the owners of property abutting the road and an opportunity to be heard before the township

Removes trees from the property. Minn. Stat. 160.22, subds. 5, 10. This notice requirement shows that the statute was enacted for the benefit of owners of abutting property. Thus, the Theusches, as owners of property that abuts Gateway Drive, clearly belong to the class for whose benefit the statute was enacted. And implying a cause of action would be consistent with the underlying purpose of section 160.22. The Minnesota Supreme Court, in applying a statute that was a predecessor to section 160.22—Minn. Gen. Stat. 2609 (1923)—commented that the statute "is in recognition of the abutting landowner's ownership to the center of the street and his right to timber growing thereon." *Powell v. Carlos Twp.*, 177 Minn. 372, 374, 225 N.W. 296, 297 (1929). But we conclude that because a separate statutory provision, Minn. Sat. 561.04 (2006), expressly provides a private cause of action for the conduct that the

Theusches complain of, the legislature did not intend to create a private cause of action for a violation of section 160.22. *See Minn. Life & Health Ins. Guar. Ass'n v. Dep't of Commerce*, 400 N.W.2d 769, 774 (Minn. App. 1987) (noting that legislative intent may also be ascertained by considering other statutes concerning the same subject matter).

Minn. Stat. 561.04 provides:

> Whoever without lawful authority cuts down or carries of any...tree...on the land of another person, or in the street or highway in front of any person's house...is liable in a civil action to the owner of such land...for treble the amount of damages which may be assessed therefore, unless upon the trial it appears that the trespass was casual or involuntary....

When the township failed to provide notice to the Theusches before it cut down the trees, it violated section 160.22. Consequently, the township was "without lawful authority" to cut down the trees. Because section 561.04 expressly provides for a private cause of action in such circumstance, there is no need to imply a private cause of action from section 160.22. We therefore reverse the district court's decision that the Theusches were entitled to damages for the violation of section 160.22.

The Theusches also argue that the district court's award of $5,600 damages (1) is the result of an error of law because it failed to include compensation for a taking of their real property and (2) is not sustained by the evidence. We have already determined that the Theusches's claim that they are entitled to compensation for a taking is barred by section 160.05. And because the district court improperly based its award of damages on the violation of

section 160.22, we remand for further proceedings to consider the Theusches' claim under section 561.04.

Affirmed in part, reversed in part, and remanded.

/s/ Bruce D. Willis

JUDGE BRUCE D. WILLIS

APPENDIX B

STATE OF MINNESOTA

COUNTY OF TODD

IN DISTRICT COURT

SEVENTH JUDICAL DISTRICT

CIVL DIVISION

C3-05-492 10/04/2006

HONORABLE CLERK OF THE COURT

WILLIAM WALKER Tammie Chapin

RICHARD AND SHARON THEUSCH,

v.

TAD BERG AND EVERETT BERG

AND LESLIE TOWNSHIP

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT, *JUDGMENT*

1. Richard and Sharon Theusch were owners of certain property located in Todd County Minnesota, legally described as follows to wit:

A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW1/4 SW 1/4) of Section Twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows, to wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25, which said point of beginning of the tract hereby conveyed; thence continuing due east, three hundred

and sixty (360) feet; thence due South four hundred fifty (450) feet; thence due west five hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township road; thence Northeasterly along the centerline of said township road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

2. That on November 14, 2003, Tad and Everett Berg, as contractors for Leslie Township, cut certain brush and stumps along a roadway formally known as Bambi Trial, now known as Gateway Drive, immediately in front of property owned by Plaintiffs.

3. That as a result of the activities of the Defendants, approximately 135 trees of various size, varieties and types, were cut and removed from the property.
4. The timber removed from the property was offered to the Plaintiffs. Plaintiffs refused the timber.
5. Bambi Trial, now know as Gateway Drive, has been in existence since the early 1970's, and the township recorded a 50 foot right of way for Bambi Trial dated 1990 and recorded in 1991.
6. The Plaintiffs were not given notice of the Hearing to record the roadway.
7. There has been public use and maintenance of Bambi Trial, now known as Gateway Drive, in excess of six consecutive years, since the early 1970's to the present time.

8. That Plaintiffs' Summons and Complaint were served on the Defendants on May 23, 2005.

9. That the cutting of the brush and trees by and at the request of the Township, and by the Bergs, was confined to the down slope area from the road which was a supporting part of Gateway Drive.

10. That the Township has acquired Gateway Drive and its supporting slope and structures, a distance equal to 25 feet on either side of the center line of Gateway Drive, as depicted on a survey completed by Sam DeLeo, dated November 8, 2005.

CONCLUSION OF LAW

1. That Plaintiff's claims are barred by the applicable Statute of Limitations, due to the

Township's maintenance activities including, Snowplowing, grating, and brush removal.

2. Plaintiffs are not entitled to a recovery for damages because their claims are barred by Satute of Limitations pursuant to Minnesota Statute 160.05.

Now therefore, the Court makes the following as its Order for Judgment:

1. The Plaintiffs are entitled to no recovery of damages.
2. That the Defendants are awarded their costs and disbursements.
3. That the Plaintiffs' claims are dismissed with prejudice.

LET THE JUDGMENT BE ENTERED ACCORDINGLY.

/s/_____

HONORABLE WILLIAM WALKER
JUDGE OF DISTRICT COURT

JUDGMENT

As required in the Order of Judgment above, the Conclusions of Law as set forth above are hereby adopted as the Judgment on file herein.

/s/_____

Tami Chapin

Court Administrator

APPENDIX C

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION

C3-05-492 02/27/2007

HONORABLE CLERK OF COURT

WILLIAM WALKER Tammie Chapin

RICHARD AND SHARON THEUSCH,

v.

TAD BERG AND EVERETT BERG
AND LESLIE TOWNSHIP

AMENDED AND RESTATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT, *JUDGMENT*

FINDINGS OF FACT

1. Richard and Sharon Theusch were owners

of certain property located in Todd County Minnesota, legally described as follows to wit:

A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW/4 SW1/4) of Section twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows: to wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and

Southwesterly thru said SW1/4 of said Section 25, which said point of beginning of the tract hereby conveyed; thence continuing due east, three hundred and sixty (360) feet; thence due South four hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township road; thence Northeasterly along the centerline of said township road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

2. That on November 14, 2003, Tad and Everett Berg , as contractors for Leslie Township, cut certain brush and stumps along a roadway formally known as Bambi Trail, now know as

Gateway Drive, immediately in front of property owned by the Plaintiffs.

3. That as a result of the activities of the Defendants, approximately 135 trees of various size, varieties and types, were cut and removed from the property.
4. The timber removed from the property was offered to the Plaintiffs. Plaintiffs refused the timber.
5. Bambi Trail, now know as Gateway Drive, has been in existence since the early 1970's, and the township recorded a 50 foot right of way for Bambi Trail dated 1990 and recorded in 1991.
6. The Plaintiffs were not given notice of the Hearing to record the roadway.
7. There has been public use and maintenance of Bambi Trail, now known as Gateway Drive, in

excess of six consecutive years, since the early 1970's to present time.

8. That Plaintiffs' Summons and Complaint were served on the Defendants on May 23, 2005.
9. That the cutting of the brush and trees by and at the request of the Township, and by the Bergs, was confined to the down slope area from the road which was a supporting part of Gateway Drive.
10. That the Township has acquired Gateway Drive and its supporting slope and structures, a distance equal to 25 feet on either side of the center line of Gateway Drive, as depicted on a survey completed by Sam Deleo, dated November 8, 2005.
11. Plaintiffs were not give notice of Defendant Leslie Township's intention to cut trees and brush pursuant to Minn. Stat. 160.22.

CONCLUSIONS OF LAW

1. Even though the cutting of trees and brush occurred within the Township right of way of Gateway Drive, Plaintiffs are entitled to damages in the amount of $5,600.00 for diminution in value of their property as a result of Defendants Leslie Township's failure to provide notice pursuant to Minn. Stat. 160.22.
2. That Plaintiff's remaining claims are barred by the applicable Statute of Limitations, due to the Township's maintenance activities including, snowplowing, grading, and brush removal.

Now therefore, the Court makes the following as its Order for Judgment:

1. The plaintiffs are entitled to damages in the amount of $5,600.00

2. That Plaintiffs' remaining claims are dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ _____

HONORABLE WILLIAM WALKER
JUDGE OF DISTRICT COURT

JUDGMENT

As required in the Order of Judgment above, the Conclusions of Law as set forth above are hereby adopted as the Judgment on file herein.

/s/ _____

Tami Chapin
Court Administrator

APPENDIX D

STATE OF MINNESOTA

IN SUPREME COURT

A07-848

RICHARD AND SHARON THEUSCH.

Petitioners,

v.

TAD BERG, et. al.,

Respondents

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Richard and Sharon Theusch for further review be, and the same is, DENIED.

DATED: July 15, 2008

BY THE COURT:

/s/_____

ERIC J. MAGNUSON

CHIEF JUSTICE

APPENDIX E

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION

C3-05-492	12/18/2006
HONORABLE	CLERK OF COURT
WAYNE R. FARNBERG	Tammie Chapin

RICHARD AND SHARON THEUSCH

v.

TAD BERG AND EVERETT BERG
AND LESLIE TOWNSHIP

ORDER

The above mentioned proceedings was heard on the 26th day of July, 2006, at 1:30 p.m., before the

Honorable Wayne R. Farnberg, Judge of District Court at the Todd County Government Center, Long Prairie, Minnesota. The Petitioner was present and represented by G. Marlene Clark of Marlene Clark, P.A., 25 Third Street South, Long Prairie, MN 56347 and the Respondent was not present but was represented by Gordon H. Hansmeier, Rajkowski Hansmeier Ltd., Attorneys at Law, 11 – 7th Ave. N., P.O. Box 1433, St. Cloud, MN 56302-1433.

Having reviewed all the files and records presented before this Court,

Now therefore, IT IS ORDERED:

1. The Defendant's Motion in Limine regarding notice and penalty issues is hereby **denied**.

Dated this 18th day of December, 2006.

/s/_____

HONORABLE WAYNE R. FARNBERG

JUDGE OF DISTRICT COURT

APPENDIX F

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

In re: Vacation of a Portion of Little Deer Beach Addition Plat of Leslie Township

FINDINGS OF FACT, CONCLUSION OF LAW, ORDER FOR JUDGMENT AND JUDGEMENT AND DECREE

THE ABOVE ENTITLED MATTER came on for hearing before the undersigned, the Honorable Donald A. Gray, Judge of said Court, at the Courthouse in the City of Long Prairie, County of

Todd, State of Minnesota, on the 25th day of September, 1984.

Petitioner appeared in person and by this attorney, Neil E. Johnson of Larson, Johnson & Peters, P.A., Long Prairie, Minnesota.

After hearing all the evidence adduced at trial by Peitioner, and being fully advised in the premises, and upon all files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. That Petitioner, MORRIS A BREKKE, is an owner of land included in the LITTLE DEER BEACH ADDITION PLAT of LESLIE TOWNSHIP.
2. That all the taxes assessed against such land described in the Petition for Vacation have been paid.
3. That the Notice required by Minnesota Statute 505.14 has been properly given.

4. That the portion of the platted road subject to the Petition for Vacation has been been developed for use as a road. It has not been used as a road, is not presently being used as such, and is presently being used in a manner which is inconsistent with the use as a road, and an alternative access has been provided for the owners and occupants of land that would be affected by the proposed vacation; and, therefore; the road, subject to this Petition, is useless for the purpose for which the Plat was laid out.
5. That all owners and occupants of land that would be affected by the proposed vacation would not be damaged thereby, and that all such parties have access by roads, easements or other methods of ingress and egress, not

subject to this Petition. That Petitioner has given an easement to the road owners of Lot 18 of the above mentioned plat, across platted and unplatted land of the Petitioner. The purpose of the Easement is to provide ingress and egress from the established Township Road to Lot 28. By the granting of such Easement, all owners and occupants of land that would be affected by the proposed vacation, would not be damaged thereby, and that all such parties have access by raod easement, or other methods of ingress and egress not subject to this Petition. Said easement granted by Petitioner is attached as Exhibit "A". Attached is Exhibit "B" which is the Consent to the Vacation by adjoining property over, Blain Ostrander. The Easement granted by Petitioner shall terminate in the event of common ownership of Lot 28 and any of the following described land

Which would provide direct access from the existing Township Road to Lot 28 without the granting of an easement.

The land described as follows:

To find the point of beginning start 230.97 feet North of the Southwest corner of Goverment Lot 2 of Section 25, Township 129, Range 35, to point of beginning; thence North 201.31 feet along the East line of Lot 28 of Little Deer Beach Addition to Leslie Township, thence Easterly to township road; thence Southerly along said township road to a point due East of point of beginning, thence to point of beginning (provided that any such common ownership must provide access from the township road to Lot 28).

Said easement shall be recorded with the County Recorder and a copy of this Order and Easement provided to the owners of Lot 28.

From the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

That the Petitioner is entitled to the Judgment and Decreee of this Court as follows:

1. That the following portions of the Little Deer Beach Addition Plat of Leslie Township shall be vacated, and that title to the portion of the road specified below shall be in the persons entitled thereto:

   That portion of the Little Deer Beach Addition Plat road situated North of an imaginary line extending easterly across said road from the South line of lot Twenty-four (24) and South from the South line of Lot Twenty-eight (28).

ORDER FOR JUDGMENT

Let Judgment be entered accordingly.

Dated: This 9th day of October, 1984.

/s/_____

HONORABLE DONALD A. GRAY
JUDGE OF DISTRICT COURT

JUDGMENT AND DECREE

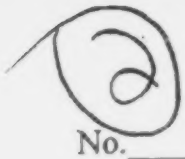
I certify that the above Conclusions of Law constitute the Judgment and Decree of this Court.

Dated: This 9th day of October, 1984

/s/_____

Margaret A. Minke
Clerk of Court

113



Supreme Court, U.S.
FILED

No. 08-710 OCT 11 2008

OFFICE OF THE CLERK

APPENDIX G

RICHARD AND SHARON THEUSCH,

Pro-Se Petitioner,

v.

TAD BERG, et al.,

Respondents,

Richard and Sharon Theusch
22308 Gateway Drive
Osakis, Minnesota 56360
320-732-3094

DEPOSITION OF MIKE BERRY

Supervisor, Leslie Township

1/26/2005

In relevant part:

Lines:

20 Q "Okay. Do you recall telling her (Mrs. Theusch) that the township had the Authority to do what they wanted Including removing her fence?

23 A Yes.

24 A Did you believe at that point as a township officer,

25 that she might feel threatened--

/s/_____

Jeanna M. Zumker, RPR

My commission expires January 31, 2010

TODD COUNTY MINNESOTA
POLICE REPORT

Name: BERG, Everett Derald
DOB: 2/28/1936, Age 67
Address: 22164 145th Ave, Osakis, MN 56360
Drivers License:
B60238139153
Role: Mentioned
Sex: Male, Race: White, Height: 5'8", Weight: 195,
Eye Color: Blue, Hair Color: Brown, LGN: T27

PUBLIC ASSIT

On 11/22/2003 at 1054 hours, Sharon Harvey (Theusch) reported that the township had cut trees on her property and she wanted someone to come out and document it.

Deputy Jon Barber #702 went to the Harvey (Theusch) residence at 22308 Gateway Drive, Section 25 Leslie Township . When I talked with Sharon she told me that Tad and Everett Berg had come out to their property on 11/14/2003 around 0930 hours and cleared the trees next to the road on their property. She stated she asked them why they were doing this and they told her they were ordered by the county to clear the trees. I was told that Tad is on the Leslie Township board.

Sharon told me that she has contacted a lawyer and looked up the laws on this issue. She told me that the township needs to give them a 14 day notice before they do any work. She also contacted the Todd County Highway Department, they told here they did not order any trees to be cut. I was also told that no other trees on the road were cut down.

I took photographs with the digital camera of the trees that were cut down and logged them under this case number.

I was also told that 109 trees were removed. I was told 23 of them were over six inches in diameter with the largest being thirteen inches in diameter.

I informed Sharon that this was a civil issue and they would need to contact the township board.
No further action was taken by this department.

DEPUTY JON BARBER #702 TODD COUNTY SHERIFF's DEPARTMENT

Page 15 of Instrument #340895

LESLIE TOWNSHIP RESOLUTION TO RECORD TOWN ROAD EASEMENTS

Description of Recorded 66 Foot Town Road Easement thru Petitioners' Property (Exhibit 16 of Court Trial Exhibits):

In revelant part: (See bold type)

Page Fifteen

Læslie Township

Road Recording

TOWNSHIP ROAD T597: (aka Bambi Trial)

A platted town road easement consisting of a strip of land 50 feet wide, commencing at a point on the south line of G.L.4 of Section 26, T129N-R35W (and 918 feet, more or less, west of the SE corner of said Section 26 and 237 feet, more or less, north of said

south line), and proceeding northerly for 127 feet more or less, there intersecting a stub road (LT-west), and then proceeding by following the plated roadway northeasterly for 1,010 feet more or less, to a point on the east section line of said Section 26 **opposite Lot 21 of Little Deer Beach Addition), and then proceeding as a town road easement 66 feet wide with 33 feet on each side of the centerline and following the existing roadbed north-NORTHEASTERLY through the NW corner of the SW1/4 SW1/4 of Section 25, T129N-R35W for 360 feet more or less,** to a point on the north line of said SW1/4 SW1/4 (and 200 feet, more or less, east of said NW corner) and continuing north-northeasterly through Government Lot 2 of said Section 25 for 700 feet, more or less, to the SE corner of a lakeshore lot (tax I.D. #15-0030000) there intersection the south plat line and south line of Lot

9 of Hughes' Lake Addition in Government Lot 2 of Section 25, T120N-R365W, and continuing northerly as noted in said plat, and proceeding as a 66 foot wide platted right-of-way road easement for 534.65 feet, more or less, to the north line of Lot 1 of said plat in Government Lot 1 of said Section 25, with the width of the R.O.W. being 66 feet at said north line, (all of the platted portions of the road as shown in the plats of Lake Osakis Acres, Little deer, and Hughes Lake Addition on file in the Todd County Recorder's office), and there terminating.

TRACT INFORMATION

Section 26: G.L.4 Lake Osakis Acres Plat, Little Deer Plat,

Section 25: GL.1, Hughes Lake Addition

OFFICE OF COUNTY RECORDER
STATE OF MINNESOTA

COUNTY OF TODD

I hereby certify that the within instrument was filed in this office for record on the 12th day of February A.D. 1991 at 10 o'clock a.m. and was duly recorded as Microfilm No. 340895

/s/

Cherly Perish

County Recorder

By: /s/ Elaine Johnson

Deputy

1960 LITTLE DEAR BEACH ADDITION PLAT

(Exhibit #3 Plaintiffs List of Exhibits for Trial)

Filed July 26, 2006

In relevant part:

"All of said tract being a part of Government Lot (4), Section Twenty-six (26), Township One Hundred and Twenty-nine (129), Range Thirty-five (35), have caused the same to be surveyed, divided, monumented and platted into 28 lots numbered 1 to 28 inclusive, all as shown on the annexed plat, and to be now and hereafter known as "Little Deer Beach Addition" to Leslie Township, Todd County, Minnesota, and do hereby dedicate to the public use **forever,** the platted as shown on the annexed plat. Platted and dedicated in accordance with Section 505.2 thru 505.04 Minnesota Statutes.

"IN TESTIMONY WHEREOF, We have hereunto set our hands this 4th day of October, 1960."……

COUNTY OF TODD

"On this 4th day of October, 1960 before me a Notary Public, within and for said County, personally appeared Clayton J. Moulton and Mabel G. Moulton, his wife and M.A. Brekke and E. Brekke, his wife, to me know to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.:"

/s/_____

LOGAN O. SCOW, Notary Public

Todd County, Minnesota

My Commission Expires February 22, 1963

"This is to certify that the within plat was examined by the Board of County Commissioners at a regular meeting held on October 10, 1960, and approved by the same on this 10th day of October, 1960."

/s/_____

Raymond La Voie, Chairman of the Board

"On this 22nd day of August AD 1960, be me personally appeared Casper O. Maxson, Dodge County Surveyor, to me personally appeared and stated he executed the above certificate of said survey and he did so as his free act and deed."

/s/_____

Leo Stucky, Notary of Public

STATE OF MINNESOTA)

COUNTY OF TODD) **#0256**

"This is to certify that the within instrument was filed in the Office of Long Prairie, on the 14th day of October 1960 at 4 o'clock p.m."

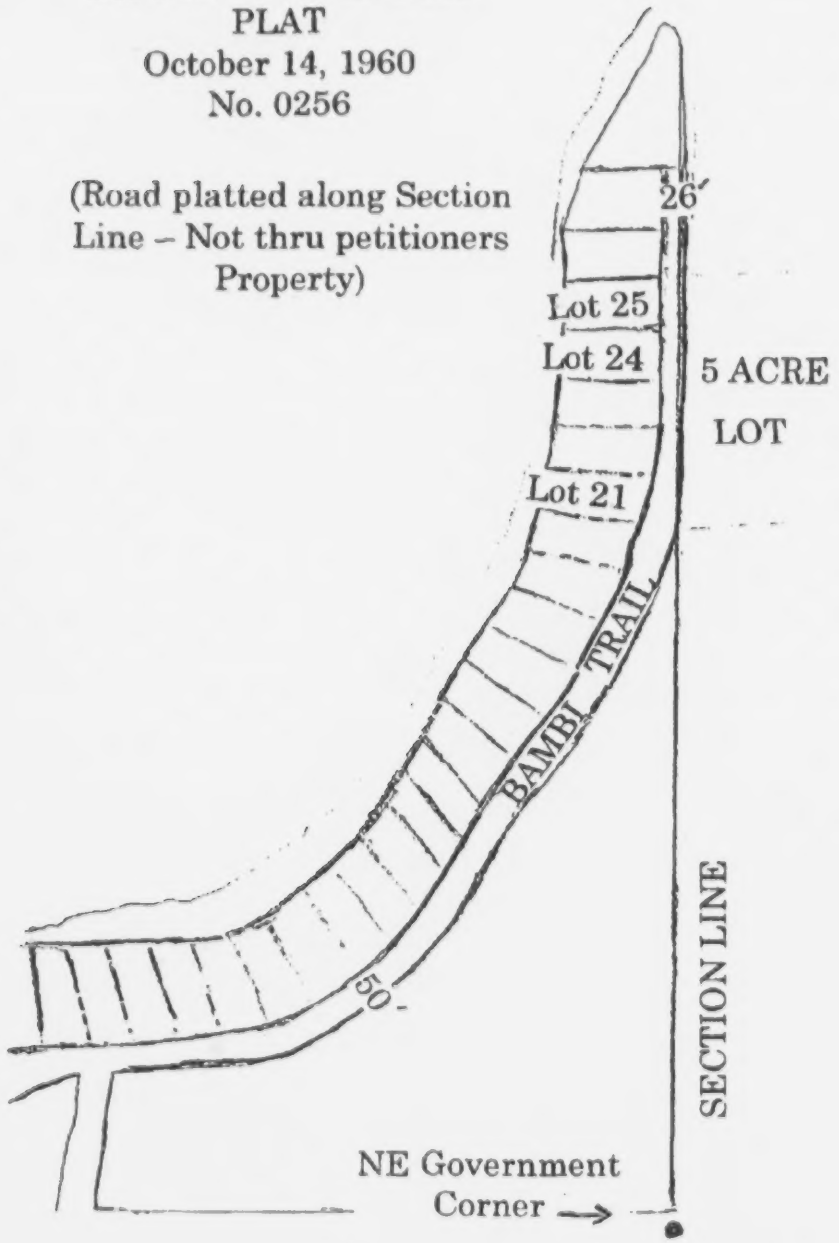
/s/_____

Fred L. Dalhman

Register of Titles

LITTLE DEER BEACH
PLAT
October 14, 1960
No. 0256

(Road platted along Section Line – Not thru petitioners Property)



LITTLE OSAKIS ACRES (Plat)

Todd County, Minnesota

In Relevant Part:

Approved by the Todd County Board of Commissioners on thes 6th day of October 1981

/s/_____

Stan Sumey

Chairman, Todd County Board of Commissioners

Attest:

/s/_____

Melvin Bense

County Auditor

REGISTRAR OF TITLES

Todd County Minnesota

DOCUMENT NUMBER: 1208

I hereby certify this instrument was filed in the office of the Registrar of Titles for record this 19 day

October **1981** at 2 o'clock p.m.

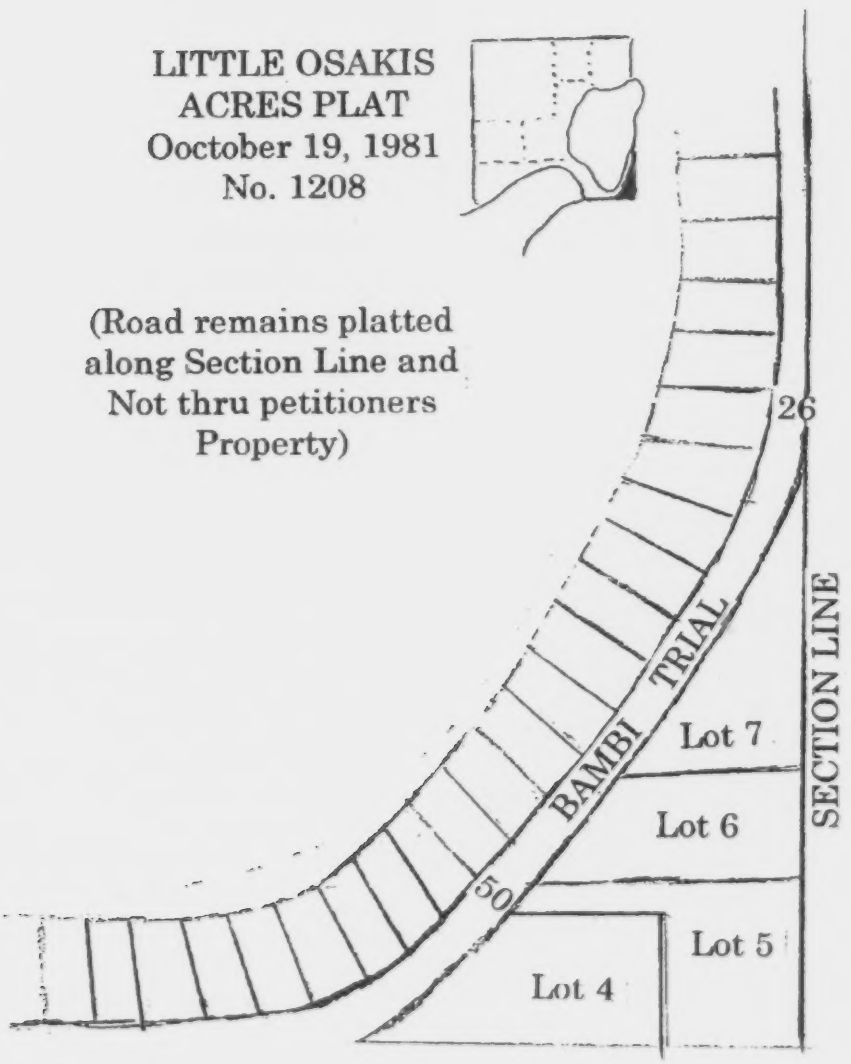
/s/_____

Fred L. Dahlman

Registrar of Titles, Todd County

LITTLE OSAKIS
ACRES PLAT
Ooctober 19, 1981
No. 1208

(Road remains platted
along Section Line and
Not thru petitioners
Property)



NORTHSTAR SURVEYING

Certificate of Survey

April 06, 2004

Survey done for Richard Theusch

(Court Exhibit #1 – Theusch Deposition Exhibit #39)

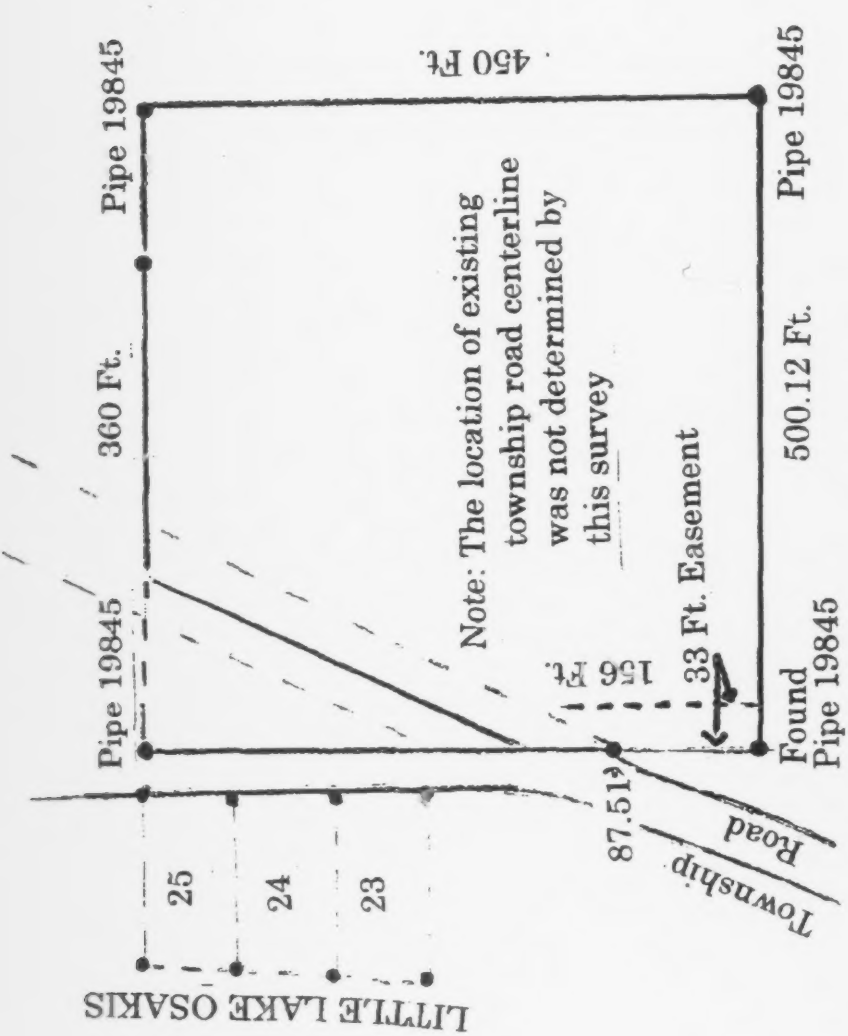
In relevant part:

Legal Description (same as deed)

"SCOPE OF WORK"

1. Showing the length and direction of boundary lines of the above legal description. The scope of our services does not include determining what you own, which is a legal matter. Please check the legal description with your records or consult with competent legal counsel, if necessary, to make sure that it is correct, and that any matters of record, such as easements, that you wish shown on the survey, have been shown.

Setting new monuments or verifying old monuments to mark corners of the property.



NORTH STAR SURVEYING INC.

720 Sourth First Street

Darwin Minnesota 55324

Phone No. (320) 693-3710

"I hereby certify this survey, plan, or report was prepared by me or under my direct supervision and that I am a duly registered land surveyor under the laws of the state of Minnesota"

/s/_____

Larry Huba

Reg. No. 24332

Date: 4/6/2004

ENGELMEYER SURVEYING

Certificate of Survey

November 24, 2004

Prepared for: Sharon Theusch

(Engelmeyer Deposition Exhibit # 1)

(Theusch Deposition Exhibit #1)

In relevant part:

LEGAL DESCRIPTION: (same as deed)

o Denotes iron pipe placed this survey

• Denotes iron pipe found this survey

"I hereby certify that this survey was prepared by me or under my direct supervision, and that I am a duly registered land surveyor under the laws of the State of Minnesota"

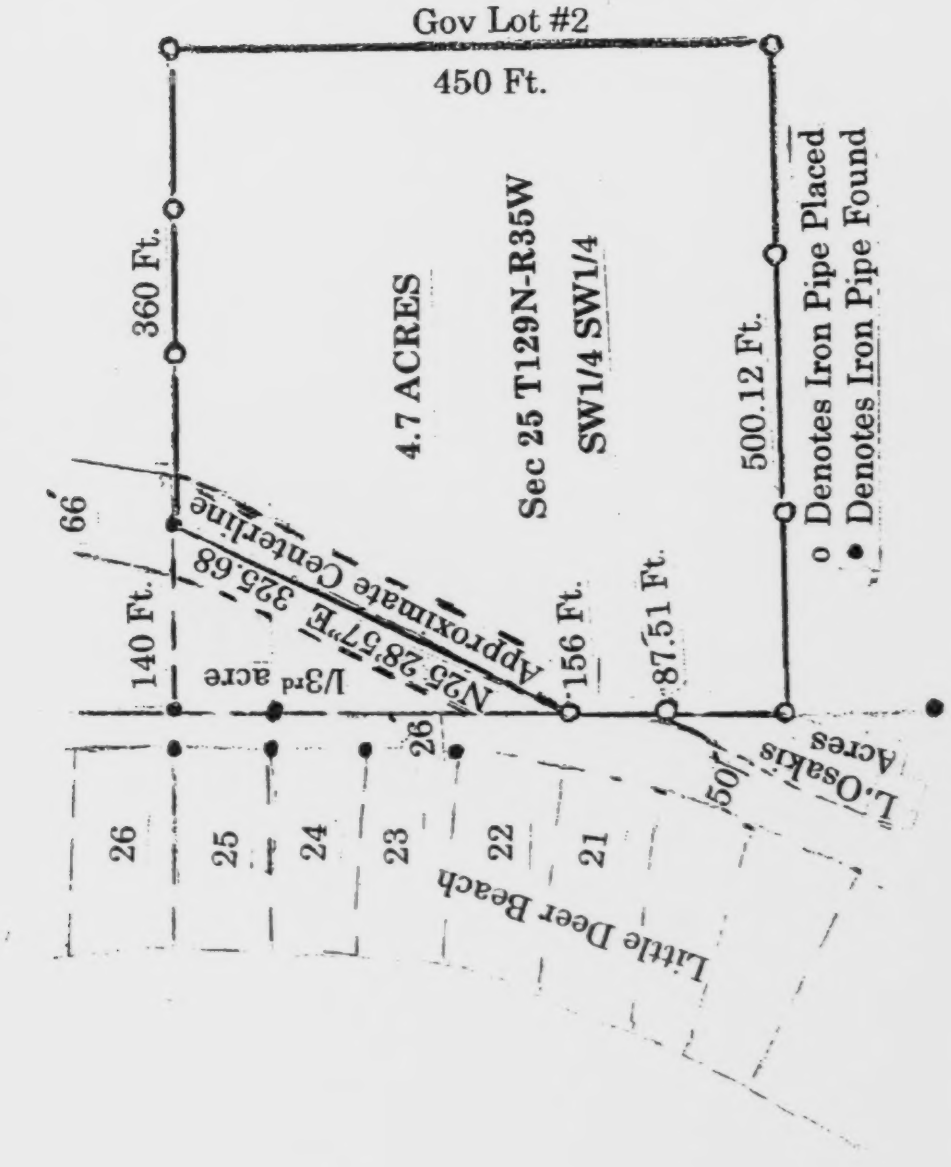
November 24, 2004

/s/_____

Ronald Engelmeyer, Land Surveyor

App. 69

Minnesota registration No. 13334



JOB NO. 333-04

ENGELMEYER SURVEYING P.A.

307A East Main Street

Melrose, Minn. 56352

320-256-7298

LETTER TO ENGELMEYER SURVEYING

Dated: September 28, 2004

Exhibit #40 of Theusch Deposition Filed with Court

In relevant part states:

"When the survey crew was packing up I went outside to ask if they understood where our easement was. To my knowledge and to a prior survey ...our easement is 33' along our Westerly Line of our property". Mr. Croatt (Engelmeyer's employee) said, "your easement is on the entire side of your property next to the road (pointing to our NE line). Mr. Groatt went on to say "That if this goes to Court, I will testify that the township has an easement to your property." He said, "our Northeast line was the same as our West Line. "

"Mr. Groatt went on to say, "That if this goes to Court, "you will not win". I was appalled, this stranger on our property whom we turned our trust over to , not only knew about my problems with the Township but was also threatening to testify against me before his work was even validated by a Licensed Surveyor....."

HALF SECTION MAP

S ½ SEC. 25 T. 129 R 35

DATE COMPLETED 3/22/1983

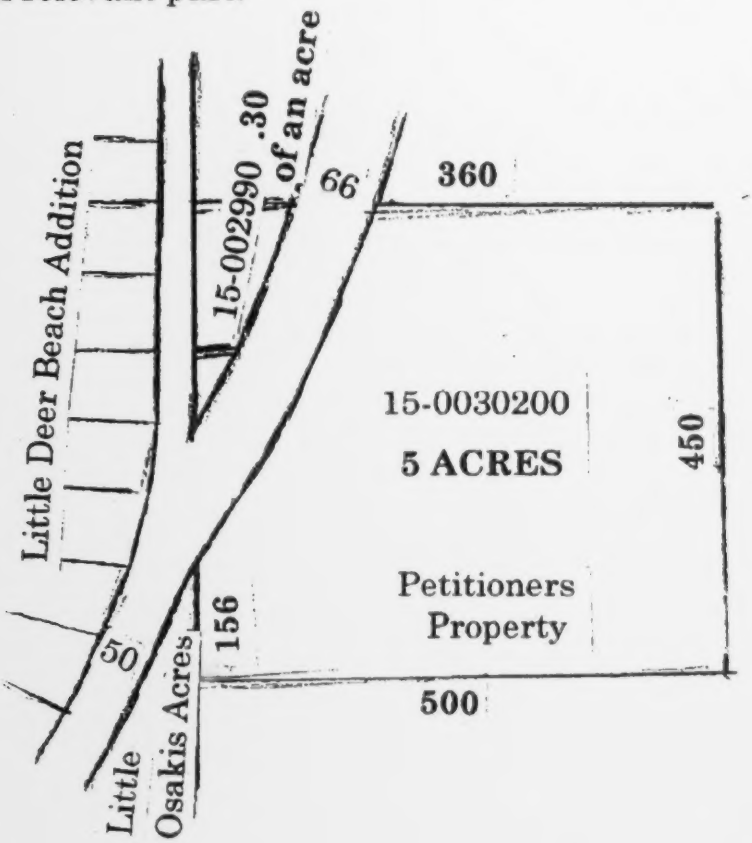
DATE REVISED: 5/21/1990

RONALD ENGELMEYER

TODD COUNTY SURVEYOR 8/23/1993

(Court Exhibit #2)

In relevant part:



G. MARLENE CLARK
ATTORNEY AT LAW
25 3RD St.South Long Prairie, Minn 56347
Office. 320732-2918
Fax. 320-732-2586

August 6, 2006

The Honorable Judge Walker
Judge of District Court
Todd County Court Facilities
Long Prairie, MN 56347

RE: Theusch v. Berg and Leslie Township
Court File No C3-05-492

Dear Judge Walker:

This case is set for jury trial to start on Wednesday, August 9 2006. I recently discovered evidence which is relevant to the disposition of this case, and not wishing to spring a surprise on the opposing part of the court, I felt it necessary and appropriate to address this issue prior to trail. The facts that I have discovered are discrepancies in the Leslie Township Resolution to Record Town Road Easements.

We were previously aware that my clients had not been notified of the proceedings even though one of the proposed roads which had not been purchased or obtained by any means by the township ran right through their property.

We also were aware that the township only published the notice for one week seven days prior to the hearing instead of the statutory requirement of 2

weeks with the second publication beings at least 10 days prior to the hearing.

We were not aware that the hearing notice was statutorily defective, nor did we know that the hearing notices sent to those property owners on the mailing list were not sent until April 11, 1990, seven days before the hearing instead of the statutory 30 day requirement.

We also did not discover that the township's recording of the resolution was on February 12, 1991, one hundred and ninety-six (196) days after the township adoption of the resolution on July 31, 1990. By statute, the township was required to record the resolution within 90 days after adoption.

Because townships are now required to record their roads and Leslie Township failed to property record their Town Road Resolution it begs the question, does the township have any legal roads? And if they don't have any legal roads, how could

they possibly have a right to cut the trees on private property?

By facsimile copy of this letter and attached documentation, I am notifying Gordon Hansmeier, attorney for Tad and Everett Berg and Leslie Township of the newly discovered evidence. I am also providing the Court with a certified copy of "A Resolution by Leslie Township, Town County, Minnesota to record Town Road Easements".

Respectfully,

/s/_____

G. MARLENE CLARK, PA.

GMC

Enclosure

cc. Gordon Hansmeier
Richard and Sharon Theusch
(Filed in District Court August 8, 2006)

HEARTWOOD FORESTRY
Kati Himanga, Consulting Forester

August 15, 2006

Judge Walker
Todd County Government Center
221 First Avenue Sout
Long Prairie, MN 56347

Re: C3-05-492

Honorable Judge Walker:

Enclosed please find photograph Exhibit 28 which I inadvertently took with me on August 10 after giving testimony.

I apologize for this oversight on my part.

Sincerely,

/s/ _____

Katie Himanga, CF

DISTRICT COURT OF TODD COUNTY

FILED

August 08, 2006

Tammie L. Chapin,

Court Administrator

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVIDISON
Court File No. C3-05-492
JUDGE: HONORABLE TIMOTHY BALAND

RICHARD AND SHARON THEUSCH.
Plaintiffs,

v.

TAD BERG AND EVERETT BERT,
INDIVIDUALLY AND AS EMPLOYEES OF
OR SUBCONTRACTORS OF LESLIE
TOWNSHIP AND LESLIE TOWNSHIP
Defendants,

DEFENDANTS' RESPONSES TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS

TO: PLAINTIFFS RICHARD AND SHARON THEUSCH, AND THEIR ATTORNEY OF RECORD G. MARLENE CLARK, 25 3rd STREET SOUTH, LONG PRAIRIE, MN 56347

Defendants Tad Berg, Everett Berg and Leslie Township, for their Responses to Plaintiffs' Request for Production of Documents state and allege as follows:

REQUEST NO. 1: Please provide all data reviewed and relied upon by your expert for purposes of this case. "Data" shall include but not limited to photos, government documents, maps, elevation

charts, reports and any written photographic, or tangible evidence which was reviewed by your expert for purposes of this litigation.

RESPONSE: This demand is objected to on the basis that it is untimely under the Court's October 28, 2005 , Scheduling Order. All discovery was to be completed by February 1, 2006, and this demand is not due until after that date.

REQUEST NO. 2: All documents and records of any sort identified or relied upon in your answers to interrogatories.

RESPONSE: This demand is objected to on the basis that it is untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and this demand is not due until after that date.

REQUEST NO. 3: All other documents, as defined below, which have not been specifically requested in the foregoing demands, but which are in your possession and related to the subject matter of this litigation.

RESPONSE: This demand is objected to on the basis that it is untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and this demand is not due until after that date.

REQUEST NO. 4: Copy of any survey(s) done on Plaintiff's property.

RESPONSE: This demand is objected to on the basis that it is untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and this demand is not due until after that date.

Dated this 31st day of January, 2006.

RAJKOWSKI HANSMEIER, LTD.

BY /s/_____

GORDON H. HANSMEIER– 40770
Attorney for Defendants
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, Minnesota 56302
Telephone: (320) 251-1055

STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION
Court File No. C3-05-492
JUDGE HONORABLE TIMONTHY BALAND

RICHARD AND SHARON THEUSCH

Plaintiffs,

v.

TAD BERG AND EVERETT BERG, INDIVIDUALLY AND AS EMPLOYEES OF OR SUBCONTRACTORS OF LESLIE TOWNSHIP AND LESLIE TOWNSHIP

Defendants.

DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORIES

TO: PLAINTIFFS RICHARD AND SHARON THEUSCH, AND THEIR ATTORNEY OF RECORD G. MARLENE CLEARK, 25 3rd STREET SOUTH, LONG PRAIRIE, MN 56347

Defendants Tad Berg, Everett Berg and Leslie Township, for their Answers to Plaintiffs' Interrogatories state and allege as follows:

INTERROGATORY NO. 1: State the name, last known address and telephone number of all individuals who have knowledge or information with regard to the subject matter of this lawsuit; describe in detail the information said witnesses possess.

ANSWER: These interrogatories are objected to on the basis that they are untimely

under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by

February 1, 2006, and these interrogatories are not due until after that date.

INTERROGATORY NO. 2: Identify and exhibits you intend to introduce at trial.

ANSWER: These interrogatories are objected to on the basis that they are untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and these interrogatories are not due until after that date.

INTERROGATORY NO. 3.: For each expert you will rely upon at trial, state the following:

a) The name and address of the expert,

b) The subject matter on which the expert is expected to testify.

c) The substance of the facts and opinions to which each expert is expected to testify.

ANSWER: These interrogatories are objected to on the basis that they are untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and these interrogatories are not due until after that date.

INTERROGATORY NO. 4: Describe in detail all written or oral communications that you, or any of your agents have had with Plaintiffs or anyone else concerning the subject matter of this litigation.

ANSWER: These interrogatories are objected to on the basis that they are untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and these interrogatories are not due until after that date.

INTERROGATORY NO. 5: Name and Company who did the surveying of the Plaintiff's property, who from the company did the survey, and who was present when the survey was done.?

ANSWER: These interrogatories are objected to on the basis that they are untimely under the Court's October 28, 2005, Scheduling Order. All discovery was to be completed by February 1, 2006, and these interrogatories are not due until after the date.

INTERROGATORY NO. 6: If Mr. Hansmeier was not present when the survey was done, when did he look at the Plaintiff's property?

ANSWER: These interrogatories and objected to on the basis that they are untimely under the Court's October 28, 2005 Scheduling Order. All discovery was to be completed by February 1, 2006, and these interrogatories re not due until after that date. In addition, this

interrogatory is objected to on the basis work product.

Dated this 31st day of January, 2006.

RAJKOWSKI HANSMEIER, LTD.

By /s/_____

GORDON H. HANSMEIER – 40770
Attorney for Defendants
11 Seventh Avenue North
P.O. Box 1422
St. Cloud, Minnesota 56302
Telephone: (320) 251-1055

MINUTES OF THE TODD COUNTY BOARD OF ADJUSTMENT MEETNG

JUNE 3, 2004

(Involves the adjoining one third acre connecting to petitioners' Northeast Line next to the alleged town road with the seven foot high, seventy foot long septice mound installed in 2005)

In relevant part states:

(3) "David Ostrander" Little Osakis Lake, Beg at NE Corner of Lot 25, Little Deer Beach, Section 25, Leslies township. (0.30 acres)"

"Variance to split off a portion of this lot to be sold to the neighbor who wants to use the site for their sewer drainfield. Variance is required to subdivide a substandard lot and to create a new substandard lot.

"David Ostrander & Pat Seri were present at the hearing. Loren and Jim made the onsite, video taped the site and this was shown. Pat said they were to the **township board and were given permission to put the sewer line under the road** and the drainfield would be placed back on this lot. Pat said they have a sewer design from Becker Escavating Co.

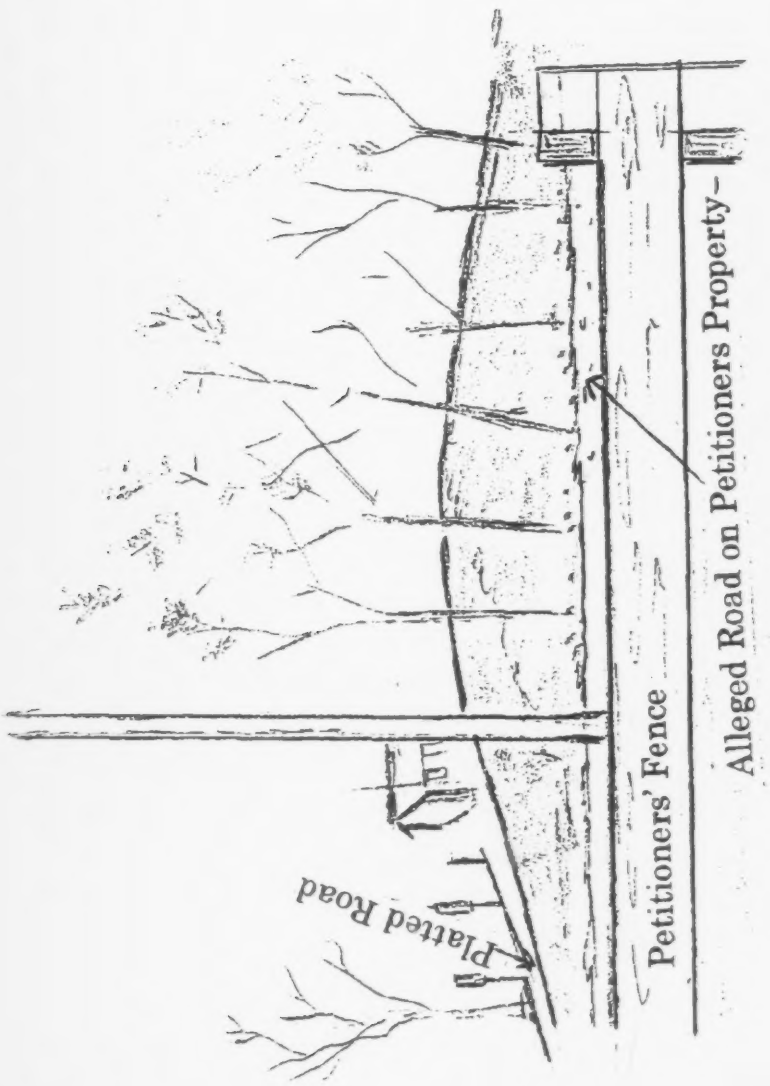
Jim gave the Zoning Office staff report: ....."Both lots would remain non-conforming. 2) It would be legal to grant an easement for the drainfield without transferring any property. This would not change the size or status of the lots. 3) If the applicant were denied the variance they would have the option of a holding tank. 4) If this application is granted a condition should be placed that this parcel should be forever joined and it be used solely for the purpose of installing a drainfield."

".....Will the issuance of the variance maintair the essential character of the locality? Gene – yes because it will only be used for sewering. All yes. 5) Does the alleged hardship involve more than economic considerations? Loren – yes, it involves sewer. All yes. 6) Will the issuance of the variance be in keeping with the spirit and intent of this ordinance, The County Comprehensive Plan and will not increase or cause danger to life or property? Bill – yes, upgrading sewer and meeting set backs. All yes."

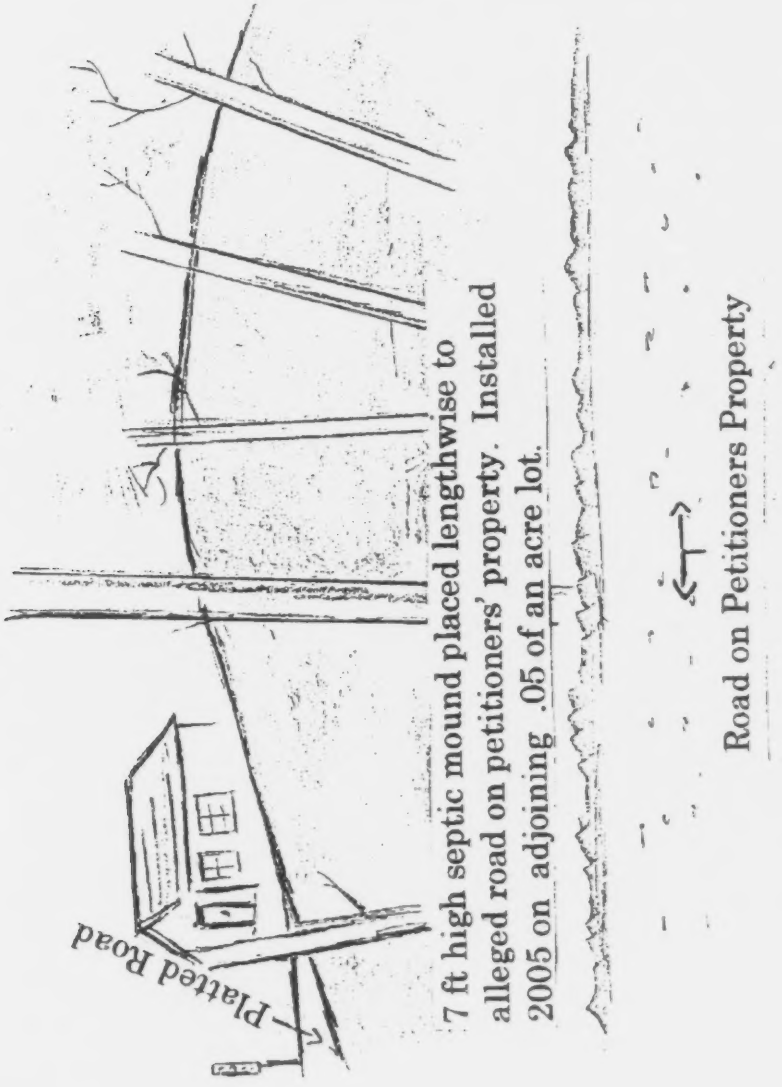
"Gene made the motion based on the findings to grant the variance on condition the newly created parcel be forever joined to lot 23, Little Deer Beach (Parcel #15-0063900) and used solely for the purpose of installing a drainfield. Bill seconded. No further discussion. Motion carried unanimously.
Meeting adjourned."

App. 94

Reproduction of Photo of Large Septic Mound Installed in 2005 on Adjoining (newly divided) .05 of an Acre Lot Next to Alleged Town Road



Reproduction of Photo of Septic Mound on Adjoining Lot Viewed From Front Yard of Petitioners Property Along Alleged Town Road



STATE OF MINNESOTA
COUNTY OF TODD
IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
CIVIL DIVISION
Court File No. C3-05-492

RICHARD AND SHARON THEUSCH
Plaintiffs,

v.

TAD BERG AND EVERETT BERG, INDIVIDUALLY AND AS EMPLOYEES OF OR SUBCONTRACTORS OF LESLIE TOWNSHIP AND LESLIE TOWNSHIP
Defendants,

NOTICE OF TAKING VIDEO TRIAL DEPOSTION OF RON ENGELMEYER

PLEASE TAKE NOTICE that the video deposition of Ron Engelmeyer, by oral examination will be taken before a qualified notary public, for all purposes allowed by Minnesota Rules of Civil Procedure, at Rajkowski Hansmeier, Ltd., 11 Seventh Avenue North, City of St. Cloud, County of Stearns, State of Minnesota, on the 4th day of August 2005, at 10:00 a.m. and thereafter by adjournment until the same shall be completed.

Dated this 24th day of July, 2006.

RAJKOWSKI HANSMEIER, LTD.

BY /s/_____

GORDON H. HANSMEIER -40770

Attorneys for Defendants

11 Seventh Avenue North
P.O. Box 1433
St. Cloud, Minnesota 56302
Telephone" (320) 251-1055

Twenty-six Page Trial Memoranda Filed with Court September 8, 2006 by Petitioners' Attorney in Relevant Part:

STATE OF MINNESOTA " VOID
TODD COUNTY W W"

IN DISTRICT COURT
SEVENTH JUDICIAL DISTRICT
COURT FILE NO. C3-05-492

RICHARD AND SHARON THEUSCH
Plaintiffs,

v.

TAD BERG AND EVERETT BERG, INDIVIDUALLY AND AS EMPLOYEES OF OR SUBCONTRACTORS OF LESLIE TOWNSHIP AND LESLIE TOWNSHIP,
Defendants.

FIINDINGS OF FACT
CONCLUSIONS OF LAW ORDER FOR
JUDGMENT AND JUDGMENT AND DECREE

STATEMENT OF CASE

The parties are Plaintiffs.....

DISTRICT COURT
TODD COUNTY
FILED
SEPTEMBER 08, 2006
Tammie L. Chapin
Court Administrator

Taxation of Costs and Bill of Costs and Disbursements Petitioners were Ordered to pay October 4th 2006 Order for Judgment District Court of Todd County MN in relevant part:

NOTICE OF TAXATION OF COSTS AND DISBURSEMENTS

Page 2

COSTS AND DISBURSEMENTS

Statutory Cost.....	$200.00
Court Administrator	
(Filing fee/**Jury Fee**/Fax filing fee).....	$340.00
Deposition Charges	
Advantage Court Reporting.....	$601.80
(Deposition of Tad and Everett Berg, Mike Berry, Sharon and Richard Theusch)	
Hubert Court Reporting	

App. 102

(Transcript Deposition of
Ron Engelmeyer..... $252.50

App. 11

Pat Curto..... $ 250.00
(Videotaped Depostion of
Ron Engelmeyer)

EXPERT FEES:

Granite City Appraisal
(appraisal, trial testimony and
travel..... $3,113.90

Kramer Leas Deleo..... $1,747.50

Engelmeyer Surveying P.A.
(Surveyor-Trial Deposition).... $ 300.00

Heartwood Forestry
(appraisal and expert testimony) $ 600.00

Miscellaneous Expenses:

Lawyers Process Service

(Service of Process) $ 185.00

Kennedy & Nervig LLP

(mediation services)..... $ 740.00

Witness Fees..... $ 145.86

TOTAL COSTS AND DISBURSEMENTS:

$8,476.56

The Costs and Disbursements in the above-entitled action are hereby taxes and allowed at the sum of **$8,476.56**

Dated this _____ day of November, 2006.

COURT ADMINISTRATOR

By_____

Deputy

Resume of Petitioners' Expert Forester Witness Who Testified During Trial:
(Court Exhibit #19)

CARL E. VOGT

Education:

Forestry, N.Y.S. College of Forestry-B.S.

Forest Biology, Syracuse University-B.S.F.

Biological Science, University of Minnesota-B.S.

Adv. Work, University of Minnesota

Affiliations and Committees:

Society of American Foresters

Minnesota Association of Arboriculture

Walnut Council

American Forestry Association

President (1983-1984) Minnesota Christmas Tree Growers' Association

Board member (1983-1993) Minnesota Maple Syrup

Producers Association

Minn. Farm Mangers & Appraisers Association

Director (1987-1998) North American Maple Syrup Council

Past Chairman – Society of American Foresters-So. Minnesota Chapter

Northern Nut Growers Association

Minnesota Forestry Association

Minnesota Christmas Tree Association

City of Maple Grove Tree Board (1987-1990)

Distinguished Forestry Award (1988) – Minnesota Forestry Association

U of M Forestry Club Award (1977-1980-1993-1997)

President (1993) Minnesota Maple Syrup Producers Association

Secretary/Treasure, (1989-2003) North American Maple Syrup Council

Professor of the Semester (2003) CNR – University Of Minnesota

Professor of the Semester (2004) CNR – University Of Minnesota

Professor of the Smester (2005) CNR – University Of Minnesota

Publications:

Conservation Volunteer. Private Forest Manage-Ment" & "The School Arboretun"

Journal of Forestry: "Utilizing the 21st Classroom"

The Minnesota Horticulturist. "Landscaping for Learning"

Minn. Dept. of Voc. Training, "Managing Natural Resources"

Minn. Dept. of Nat. Resources: "Pathways to the Outdoors"

Minn. Env. Sciences Foundation: "Planning An Awareness Environment"

U.S. Fish & Wildlife Service. "Site Planning Guide"

National Wildlife Federation:. "Outdoor Activities"

Editor – "Minnesota Maple News" – MMSPA

Editor. "Christmas Tree Newsletter" – MCTGA

Developed & Edited over 250 Site Plans in the U.S. & Canada

Proceedings – Owners & Users Conference – U of M & DNR

Author. "Minnesota Maple Fact Sheets" U of M

Co-Author. "Growing Black Walnut Trees in Minn. " – U of M

Co-Author & Photographer. "Black Walnut Slide Series" – U of M

Co-Author. "Growing Christmas Trees in the Upper Midwest" – U of M

Certifications:

Nursery Inspection License # 20014258

Second Education: Biological & Physical Seciences

Professional Experience:

Laboratory Instructor-N.Y.S. College of Forestry
1963 thru 1964

Forester – Minnesota Conservation Department
1964 thru 1968

Planning Coordinator – Minn. Env. Sciences Foundation 1968 thru 1975

Municipal Tree Inspector 1975-1989

Consulting Forester 1973 –

Consulting Arborist 1975 –

Extension Forester (Part-time) Univ. of Minnesota
1977

Instructor (Part-time) College of Nat. Res. Univ. of Minnesota 1980 –

Nursery Operator 1976

CALLIES LAW

August 1, 2007

Sharon and Richard Theusch
22308 Gateway Drive
Osakis, MN 56360

Re: Theusch v. Berg and Leslie Township
Court of Appeal No: A07-848

Dear Mr. and Mrs. Theusch:

Enclosed is a copy of the Notice of Withdrawal of Counsel that has been filed with the Clerk of Appeals.

Please be advised that withdrawal of an attorney does not create any right to extend briefing deadlines or postpone argument. All briefs have already been submitted in a timely manner and the oral argument has not yet been scheduled as of today. The Court of Appeals will send future notices in this matter to you directly. I will forward anything that I receive in the interim to you.

Sincerely,

*/s/*_____

PAULA A. CALLIES
Callies Law, PLLC
1450 The Colonard
5500 Wayzata Blvd.
Minneapolis, Minnesota 55416
(763) 546-8020

Enc.

June 27, 1986

Dick Bautch
MN Department of Transportation
501 South Victory Dr.
Mankato, Minnesota 56001

Dear Dick:

Enclosed is our final report for the special project regarding the recording of township roads. As you know I had hoped that the final report would be adopted legislation allowing an alternative method of recording roads.

I'm convinced that the support exists to pass legislation allowing for an alternative recording process. The problem is to carefully word legislation that simplifies the existing process and makes it more economical to record roads.

The last exhibit in this report is one final attempt to draft proposed legislation which will accomplish our goal of cost effectiveness and simplicity. Although our grant period is over, I intend to personally track this proposal for another legislative session.

Within a few days our fiscal officer, Lorraine Patton, will mail the necessary financial documents regarding this grant.

Sincerely,

H. Eugene Hippe
Executive Director
HEH:kr
Encl.
cc. Merrit Linzine

333 West Sixth Street, Willmar, Minnesota 56202
(612) 35-8504

A PROPOSAL FOR AN ALTERNATE METHOD TO RECORD TOWNSHIP ROADS/TOWN ROAD STUDY
FINAL REPORT TO MNDOT

Township Road Study Page 23 in relevant part:

"Research conducted in the county recorder's offices may have provided the most important source of information in the Town Road Study. **According to current law, township road orders relating to establishment, vacation and alteration of a road must be filed with the county recorder."**

TOWNSHIP ROAD MILEAGE CERTIFICATION

I hereby certify that the mileage listed for **LESLIE** Township in the County of Todd is that mileage that has been maintained and open to the traveling public at least eight months of the years 1987.

- 1986 Mileage 38.188 miles.

DATE: October 27, 1987

/s/_____

Leslie B. Berry

Signature, Township Officer

- As submitted to County Engineer's Office by Township
  Actual field measurement not verified by County.

  Please Return By Novemeber 12 to:

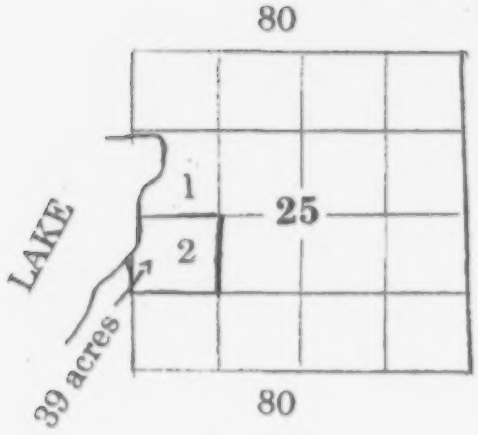
  Todd County Highway Department
  Rt. 4 Box 5
  Long Prairie, Minnesota 56347

ABSTRACT OF TITLE

TO THE FOLLOWING DESCRIBED REAL ESTATE SITUATED IN

TODD COUNTY, STATE OF MINNESOTA, TO WIT:

The east half of the Southwest Quarter (El/2 of SW1/4) and Southwest Quarter of the Southwest Quarter (SWl/4 of SW1/4) and Government Lot Two (2) all in Section Twenty five (25) Township One Hundred Twenty Nine (129) North, Range Thirty Five (35) West of 5th P.M. containing 159 acres, more or less, according to the United States Government Survey thereof.



Compiled By

Dahlman Abstract Company

Long Prairie, Minnesota

1979 TODD COUNTY MINNESOTA TAX ROLL

in Revelant part:

(Exhibit # 34 of Theusch Deposition)

IN WHOSE NAME ASSESSED:

251 I Theordore J. & Sharon A. Harvey

Osakis, Minn. 56360

SCHOOL DISTRICT:

213

DESCRIPTION:

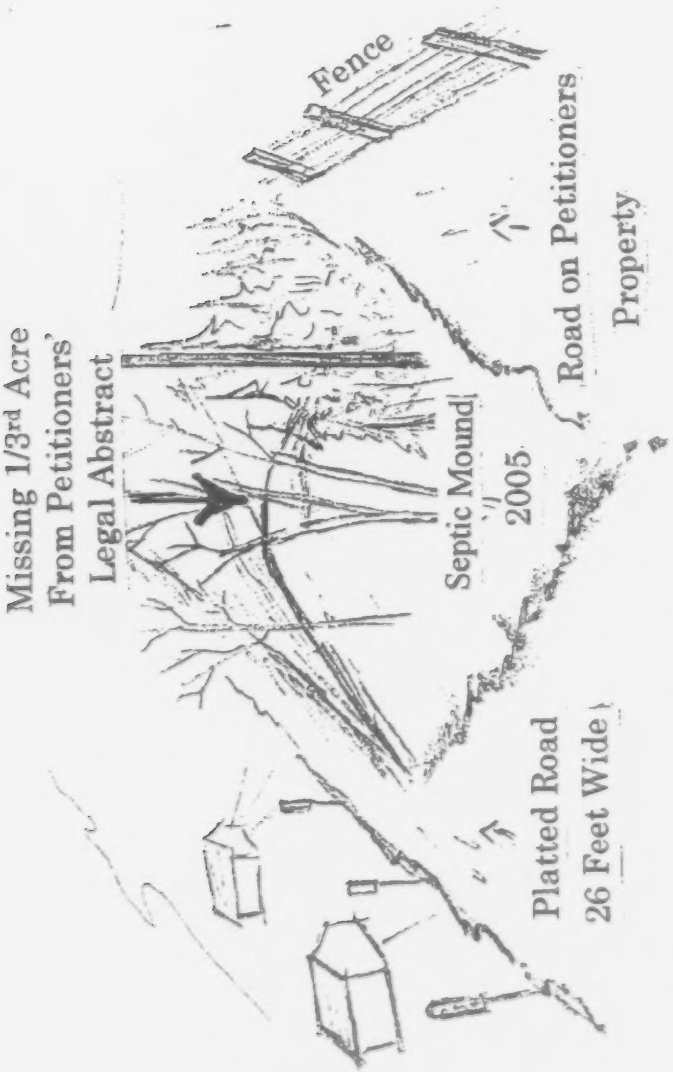
Beg at pt 140 ft. E of NE Cor of Lot 25 Little Deer Beach, E 360 ft. S 450 ft, W 500 ft. N 156 ft. NE to beg. Being part of Lot 2 & SW ¼ SW ¼

RANGE:

35

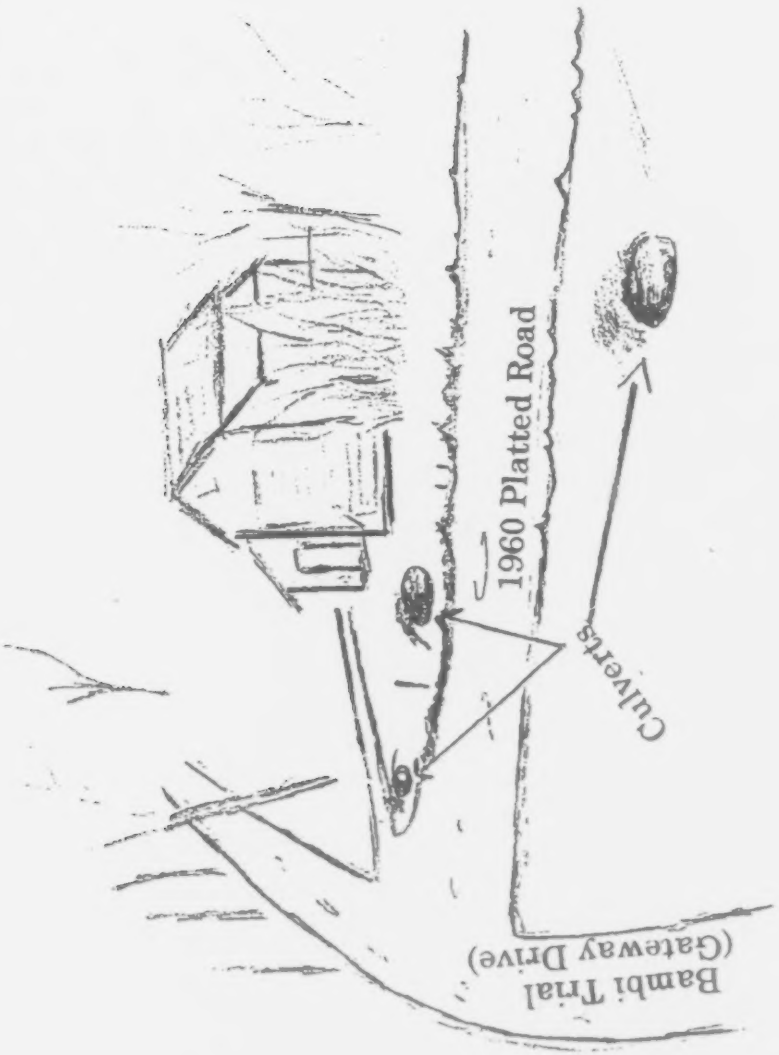
ACRES: 5 (FIVE)

Reproduction of Photo Illustrating Town Road "Forking" thru Petitioners Property on right – 1960 Platted Road on left.



App. 120

Reproduction of Photo Illustrating Culverts Under 1960 Platted Road (Not on New Road on Petitioners Property)



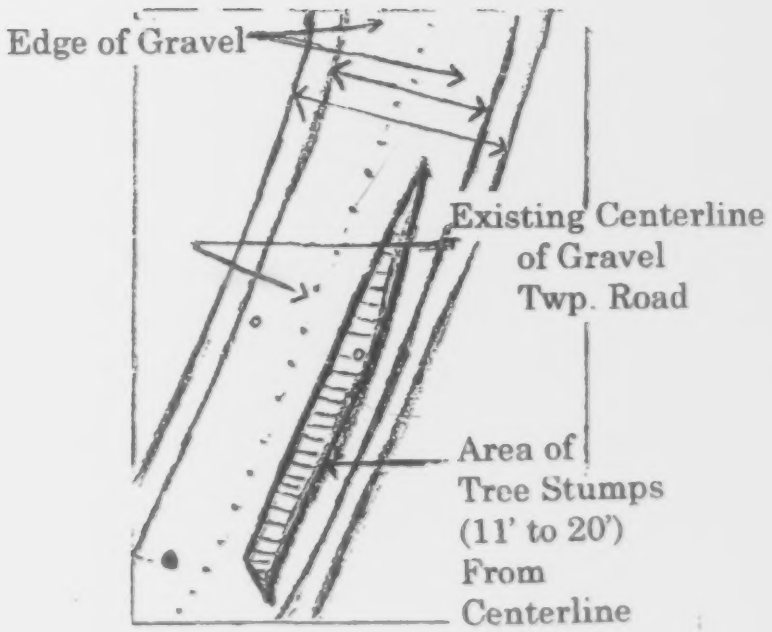
App. 121

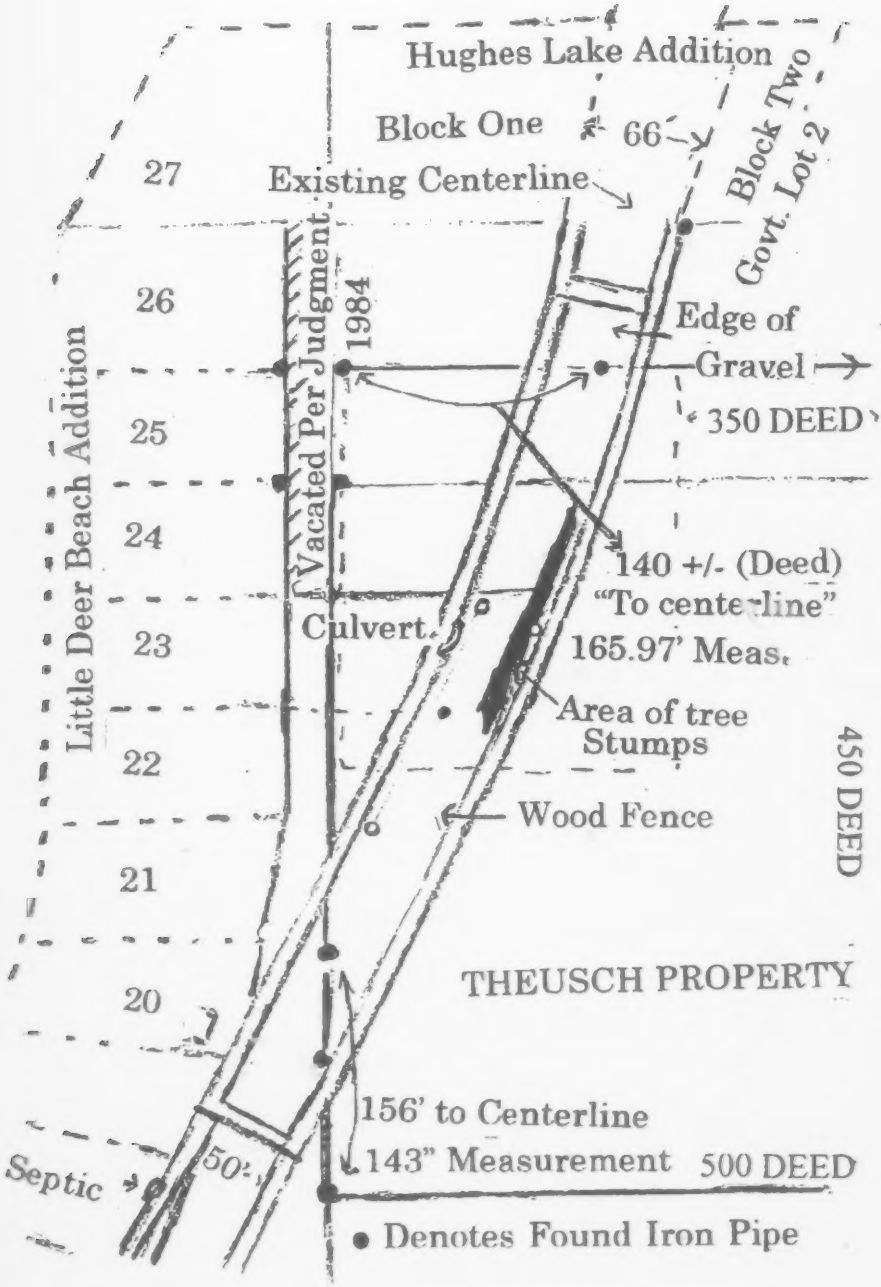
SURVEY PREPARED FOR LESLIE TOWNSHIP

NOVEMBER 11, 2005

In Section 25, twp. 29, Rng. 35

Todd County, Minnesota




Hughes Lake Addition
Block One
66'
Block Two
Govt. Lot 2
27
Existing Centerline
26
Vacated Per Judgment
1984
Edge of
Gravel
350 DEED
25
24
140 +/- (Deed)
"To centerline"
Little Deer Beach Addition
Culvert
23
165.97' Meas.
Area of tree
Stumps
22
Wood Fence
450 DEED
21
THEUSCH PROPERTY
20
156' to Centerline
143" Measurement
500 DEED
Septic
50'
• Denotes Found Iron Pipe

"I hereby certify that this plan, survey, report was prepared y me or under my direct supervision under the laws of the State of Minnesota.

/s/_____

Samual J. Deleo

MN. License No. 40341

11/08/2005

Project No. RAKOH051

KLD

11 North 7th Avenue

Suite 100

St. Cloud, Minnesota 56303

320-259-1265

TODD COUNTY, MINNESOTA
PLANNING ZONING COMMISSION
NOTICE TO ADJOINING PROPERTY OWNERS
AND
TOWNSHIP AND MUNICIPAL OFFICIALS

The Preliminary Plat of Little Osakis Acres" has been submitted by Robert Asseln, Osakis.

The property is located at Lake Osakis, SE corner of Gov't Lot 4 Section 26, Leslie Township containing 7 acres more or less.

Plat consists of: Block l, Lots 1 thru 7.

A public hearing will be held by the Planning and Zoning commission on Thursday May 28th, 1981 at 8:00p.m. in the basement of the Court House Annex, Long Prairie at which time you may appear if you so desire, either in person or by agent or attorney, in opposition to or support of proposed plat.

The hearing of the request is not limited to those receiving copies of this notice, and if you know of any neighbor or affected property owner, who for any reason, has not received a copy, it would be appreciated if you would inform them of this public hearing.

The Planning and Zoning Commission would appreciate any comment or input you may have on this matter.

DATE: May 18,1981

Respectfully,

/s/_____

Ruben C. Kuehne

Planning Commission Chairman

(Petitioners were not on the following attached mailing list even though their property connects to Lot 7 of this Plat)

1. Glen Batten

Osakis

2. David Ostrander
   Route 3, Osakis
3. Robert Lunceford
   Route 3, Osakis
4. Mabel Moulton
   6242 Look Out Trail
   Still Water, Mn
5. Jerry Nortman
   850 Sherwood Ave.
   St. Paul 55106
6. Daniel Orsello
   1544 E. Montana St.
   St. Paul, Minn. 55106
7. Don Clausen
   Route 3, Osakis
8. Jack Mohrland
   Route 3, Osakis
9. Harry Rodenberg

Route 3, Osakis

10. Vincent Hanson

Route 3, Osakis

11. Ronald Starke

10520 President Dr. NE

Blaine 55434

12. Jerry Herber

1045 Grant Circle No.

Anoka 55303

13. Lewis Lehman

19011 Pascal St. NW

Elk River 55330

14. James Jones

4343 Drew Ave. No.

Mpls. 55422

15. Blaine Ostrander

Route 3, Osakis

16. Morris A. Brekke

5731 Osman Ave. No.

Stillwater, Mn.

17. Gordon Duffee
    Route 3, Osakis
18. Ken Eastman Sr.
    Route 3, Osakis
19. Duane Zabel
    Route 3, Osakis
20. Richard Fearing
    Route 3, Osakis
21. Mrs. Ethel Hanson
    Route 3, Osakis
22. Loren Hughes
    Route 3, Osakis
23. Roger Triebenbach
    Route 3, Osakis
24. Chet Sjvern
    Route 3, Osakis
25. Tony Schnieder
    Route 3, Osakis

26. Erhart Farber
    Route 3, Osakis
27. Osakis Telephone Co.
    Osakis, Minn.
28. Minn. Power & Light Co.
    Long Prairie, Minn. 56347
29. Roland Anderson
    Leslie Twp. Chairman
    Long Prairie 56347
30. Darwin Hetland
    Leslie Twp. Clerk
    Osakis, Minn.
31. Ex-officio Commission Members
32. Robert George
    Route 3, Osakis

118 (4)

No. 08-710

Supreme Court, U.S.
FILED
JAN 30 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD THEUSCH, *et ux.*,

Petitioners,

v.

TAD BERG, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION

GORDON H. HANSMEIER
RAJKOWSKI HANSMEIER LTD.
Attorneys for Respondents
11 Seventh Avenue North
P.O. Box 1433
St. Cloud, Minnesota 56302
(320) 251-1055

220800

COUNSEL PRESS
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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION ...	6
I. There Is No Compelling Need For The Court's Guidance On The Questions Presented.	6
II. Petitioners Interpretation Of Minnesota Law Concerning Dedication Of Township Roads Is Incorrect.	10
A. Petitioners Are Barred From Challenging The Existence Of Gateway Drive By The Applicable Statute Of Limitations.	10
B. Gateway Drive Was Properly Established.	11
C. Various Laws Cited By Petitioners Are Inapplicable To The Instant Case.	12
III. Since Petitioners Have Not Properly Asserted A Claim For A Taking Of Private Property For A Public Use, This Matter Is Not Ripe For Review.	15

Contents

Page

A. An Inverse Condemnation Claim Is The Proper Method of Seeking Compensation for A Taking. 15

IV. Quotations In Petitioners' Petition For Writ Of Certiorari Are Incorrect And Should Be Disregarded. 16

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Alevizos v. Metropolitan Airports Commn., 317 N.W.2d 352 (Minn. 1982) 15

Becker v. Mayo Foundation, 737 N.W.2d 200 (Minn. 2007) 9

Daugherty v. Sowers, 68 N.W.2d 866, 868 (Minn. 1955) 11

Keiter v. Berge, 18 N.W.2d 35, 38 (Minn. 1945) 11

Shinneman v. Arago Township, 288 N.W. 2nd 239 (Minn. 1980) 9, 10

State v. Sutton, 65 N.W. 262 (1895) 16

Thomsen v. State, 170 N.W.2d 575 (Minn. 1969) .. 15

Thompson v. Town of Berlin, 91 N.W. 25 (1902) 16, 17

Vern Reynolds Constr., Inc. v. City of Champlin, 539 N.W.2d 614 (Minn. Ct. App. 1995) 15

Wojahn v. Johnson, 297 N.W.2d 298 (Minn. 1980) 11

Cited Authorities

Page

Statutes:

Minn. Stat. §117.50 through §117.56 13

Minn. Stat. §117.012 14

Minn.Stat. §117.075 15

Minn. Stat. §160.05 ..... 10, 11, 14

Minn. Stat. §164.35 ..... 11, 12

Rule:

Sup. Ct. R. 10 6

STATEMENT OF THE CASE

Petitioners Richard and Sharon Theusch own real estate in Todd County, Minnesota, legally described as follows:

> A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section Twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows, to-wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25, which said point is the point of beginning of the tract hereby conveyed; thence continuing due east, three hundred sixty (360) feet; thence due South four hundred fifty (450) feet; thence due west five hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township

> road; thence Northeasterly along the centerline of said Township Road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

(App. 34c-5c). Petitioner Sharon Theusch purchased this property along with her former husband on a contract for deed in 1979. As the legal description indicates, the northwestern boundary of the Petitioners' property is the center line of a Township road. This Township road, Gateway Drive, formerly known as Bambi Trail, is at the center of the dispute in this matter.

Leslie Township contracts with Todd County for snow removal on Leslie Township roads. (App. 3a-4a). In the fall of 2003, Todd County informed Leslie Township that certain roads in Leslie Township have trees and brush that extend into the roadway and interfered with the operation of snow plow equipment. (App. 4a). One of the problem areas identified by Todd County was Gateway Drive. *Id.*

When Todd County contacted Leslie Township and informed them that trees and brush needed to be trimmed on the eastern portion of Gateway Drive, Leslie Township retained the services of E. Berg & Son Excavating to trim brush and trees along Gateway Drive. (App. 35c-36c). On November 14, 2003, Tad and Everett Berg went to Gateway Drive immediately adjacent to the Petitioners' property and began to remove brush and trees in the ditch of Gateway Drive that interfered with the use and maintenance of Gateway Drive.

(App. 4a). The trees that were cut were located on the slope of the ditch of Gateway Drive. (App. 36c). The Bergs cut trees only in the right of way of Gateway Drive. *Id.* Approximately 135 trees of various size, varieties and types, were cut and removed from the property. (App. 4a). The lumber from the cut trees was taken to the E. Berg & Son Excavating gravel pit near the Petitioners' property. (App. 36c). The lumber was offered to the Petitioners on numerous occasions. *Id.*

A substantial amount of evidence was presented at trial concerning the use and maintenance of Gateway Drive. Mrs. Theusch testified that snow has always been plowed off Gateway drive and it has been regularly graded since the Petitioners purchased the property in 1979. She also testified that the public has been using Gateway Drive for "quite some time" and for "years and years." Douglas Kaiser, Leslie Township Supervisor since 1997, is responsible for township road maintenance. Parts of his duties include conducting road inspections. Snow plowing and road grading has been conducted on Gateway Drive in excess of six years. (App. 36c-37c). During snow plowing, snow is regularly pushed from the traveled portion of Gateway Drive onto the ditch area where the Petitioners' trees and brush were cut. Gerald Beck, Leslie Township Supervisor from 1985 to 1992, testified at trial that maintenance was performed on Gateway Drive during the time he was a township supervisor. This maintenance included trimming trees and brush, gravelling, snow plowing, and grading. These types of maintenance were performed on Gateway Drive in excess of six consecutive years. Additionally, annual road inspections of Gateway Drive were conducted. Dwayne Zabel has owned property

along Gateway Drive since 1970. He has lived at this property along Gateway Drive since 1976. Mr. Zabel was present when Gateway Drive was established in 1971. Mr. Zabel was aware that the Gateway Drive right of way was 66 feet as it measured 33 feet from the centerline to the edge of the ditch.

Licensed surveyor Sam DeLeo also testified at trial. DeLeo surveyed Gateway Drive and the Petitioners' property. Deleo testified that the trees cut by the Bergs are located within eleven to twenty feet from the centerline of Gateway Drive. Gateway Drive has a ditch area that slopes down and away from the traveled portion of the roadway. Deleo testified that all of the tree stumps and cut brush were located on the area sloping down from the traveled portion of Gateway Drive into the ditch area. DeLeo also testified that the cut brush and tree stumps were located within 25 feet of the centerline of Gateway Drive. He also completed a Certificate of Survey which shows all the cut trees and brush within eleven to twenty feet from the centerline of Gateway Drive. (App. 121).

Petitioners offered limited testimony at trial concerning the amount of damages they claim to have suffered due to the removal of trees along Gateway Drive. Dale Gimbel, a real estate appraiser, testified that the Petitioners' property decreased in value by $18,900.00 due to the removal of the trees. However, he also admitted that the trees could be replaced with seedlings at a cost of one to five dollars per tree. He also testified that if the cut trees were replaced at the same density as they were prior to being cut; the replaced trees may not live. Carl Vogt, a forester, also

testified concerning damages. Vogt testified that the value of the cut trees was $7,472.00. He also testified that only forty trees should be planted in the area where the trees were cut. He stated that replacement cost for these forty trees was approximately $21,500.00 to $26,500.00. James Mohler, another forester, testified that replacement cost of the cut trees was $9,545.00.

Respondents offered a substantial amount of damages testimony at trial. First, Katie Himanga, a Certified Forester, offered her opinion concerning the cut trees. Ms. Himanga visited the site and viewed the stumps of the cut trees. She noted that some of the trees were dead before they were cut. The cut trees were all 25 years old or less. None of the trees were oak trees. The species of the cut trees were ash, maple, elm and box elder. All the cut trees were located on the slope away from the road down into the ditch along Gateway Drive. The density of the cut trees would have resulted in the death of a substantial amount of the trees. Typically, trees in a forest are ten to twenty feet apart when they mature. Only sixteen trees are necessary to replace the cut trees and maintain the screen of the cut trees. The cost of replacing the cut trees with sixteen properly spaced trees is $1,430.00. Ronald Zitzow, a certified real estate appraiser, performed a full appraisal on the Petitioners property. He determined that the diminution of value of the Petitioners property was $5,600.00 due to the removal of the trees.

Petitioners claims were tried before the court from August 9 and 10, 2006, in Todd County District Court, the Honorable William Walker presiding. On October 4, 2006, the trial court issued an order dismissing

Petitioners' claims without awarding damages. (App. 27b). Petitioners then moved the trial court for amended findings or, in the alternative, a new trial. On February 27, 2007, the trial court issued Amended and Restated Findings of Fact, Conclusions of Law and Order for Judgment awarding Appellants $5,600.00 for violating Minn. Stat. § 160.22 and dismissing Petitioners' remaining claims. (App. 33c-39c). The Court of Appeals affirmed the decision of the trial court, with the exception of the trial court's ruling that the Petitioners are entitled to an award of $5,600.00 for a violation of Minn. Stat. § 160.22. (App. 1c-26c). The Court of Appeals remanded the case to the trial court on the issue of whether the Appellants are entitled to damages pursuant to Minn. Stat. § 561.04. *Id.*

REASONS FOR DENYING THE PETITION

I. There Is No Compelling Need For The Court's Guidance On The Questions Presented.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Generally, the Supreme Court considers the following types of cases for review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the

> accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Review is not routinely granted in a situation where the petitioner is seeking review of an "erroneous factual finding or the misapplication of a properly stated rule of law." *Id.*

First, it is difficult to determine the exact issue Petitioners are seeking review of in their Petition for Writ of Certiorari. Throughout Petitioners' Petition, they complain about numerous aspects of this matter and how it progressed through the court system. Petitioners allege their property was taken for public use without compensation. They also complain that their attorneys did not perform in accordance with Petitioners' instructions. Petitioners are also not satisfied with the surveyor they retained as an expert

witness in this matter. Petitioners' other complaints include, but are not limited to, the following:

1. a motion for summary judgment was not requested by either party;

2. Petitioners' attorney forgot her exhibits in her office during trial;

3. Respondents refused to answer interrogatories because they were untimely;

4. the trial court judge sustained many objections in favor of the Respondents;

5. that Petitioner Sharon Theusch was deposed;

6. Petitioners' attorney did not challenge testimony at trial;

7. a copy of Petitioners' Trial Memorandum, dated September 8, 2006, apparently has "void ww" written on the first page;

8. exhibits at trial were not marked ahead of time;

9. Petitioners' counsel failed to inform her clients that she was running for Todd County Attorney;

10. Respondents' counsel objected to testimony of Petitioners' expert witness; and

11. the trial court judge viewed Petitioners' property after the trial.

Ultimately, it appears that Petitioners are seeking review by the Supreme Court because they are not satisfied with the fact that Todd County District Court

and the Minnesota Court of Appeals did not rule in their favor. Also, it appears Petitioners are seeking review because they are unhappy with their attorneys. While it is difficult to determine from Petitioners' Petition for Writ of Certiorari, it appears their main concern is that a town road was established without their consent and without compensation.

Petitioners' Petition for Writ of Certiorari should be denied as this matter does not meet the criteria for discretionary review by the Supreme Court. First, the question presented is not an important question upon which the Supreme Court should rule. This case is not ripe for review because the Minnesota Supreme Court has addressed the issues in this matter. There is no conflict of law or need for the decisions of the Minnesota Supreme Court regarding this matter to be reviewed or overturned. The Minnesota Supreme Court recognized the statute of limitations provided for in Minn. Stat. §160.05 in *Shinneman v. Arago Township*, 288 N.W. 2nd 239 (Minn. 1980). This statute of limitations has been established law in the State of Minnesota for almost thirty years. Furthermore, in *Becker v. Mayo Foundation*, 737 N.W.2d 200 (Minn. 2007), the Minnesota Supreme Court determined that courts are prevented from creating new statutory causes of action that do not exist at common law when the legislature has not provided for a cause of action by the express terms of a statute or by clear implication. While the issues raised in this litigation are clearly important to the parties, they are issues which do not rise to a level which makes them compelling to the Supreme Court. Petitioners are simply dissatisfied with the application of established law by the Todd County District Court

and the Minnesota Court of Appeals to the facts of the instant case. Therefore, further review by the Supreme Court is not warranted.

II. Petitioners Interpretation Of Minnesota Law Concerning Dedication Of Township Roads Is Incorrect.

A. Petitioners Are Barred From Challenging The Existence Of Gateway Drive By The Applicable Statute Of Limitations.

Petitioners are apparently arguing that they are entitled to "just compensation" for the establishment of Gateway Drive. However, *Shinneman* provides that Minn. Stat. §160.05 contains a statute of limitations. When the statute of limitations runs, an owner is estopped from denying the existence of a public roadway. Whenever a road has been used and kept in repair for at least six consecutive years, the road is deemed to be dedicated to the public and an adjacent landowner is estopped from challenging the existence of a town road once the six-year period ends. See Minn. Stat. §160.05. In the instant case, Petitioners knew of the existence of the roadway at the time the property was acquired in 1979. In fact, the town road is referenced in the legal description of Petitioners' property. Petitioner's legal description states that border of their property runs "due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25 . . . ." (App. 34c-35c). Since the Petitioners waited over twenty years to challenge the existence of the public roadway, they are barred from doing so. Therefore, Petitioners are not

entitled to compensation due to the establishment of a township road or vacation of a township road.

B. Gateway Drive Was Properly Established.

To prove common law dedication, one must show the property owner's express or implied intent to devote land to public use and the public's acceptance of that use. *Wojahn v. Johnson*, 297 N.W.2d 298, 306-7 (Minn. 1980). Ordinarily, whether the owner intended to dedicate the land and whether the public accepted the dedication are questions of fact. *Keiter v. Berge*, 18 N.W.2d 35, 38 (Minn. 1945). Once the public accepts the owner's dedication, the common law dedication is immediately effective. *Daugherty v. Sowers*, 68 N.W.2d 866, 868 (Minn. 1955). Unlike statutory dedication, no specific "waiting" period is required. *Wojahn*, 297 N.W.2d at 306-07 n. 4. In addition, dedication is irrevocable after public acceptance unless the public consents to revocation. *Keiter*, 18 N.W.2d at 38. Thus, an owner's dedication binds his or her successors in interest. *Daugherty*, 68 N.W.2d at 868-69.

Petitioners incorrectly argue that Gateway Drive was not established as a township road. Township roads in the State of Minnesota can be established through numerous procedures. Town roads can be dedicated through common law dedication and statutory dedication pursuant to Minn. Stat. §160.05. Petitioners argue that the Township did not acquire Gateway Drive until it attempted to map Township road pursuant to Minn. Stat. §164.35. This is an incorrect statement. Pursuant to Minn. Stat. §160.05, a township need only perform maintenance on a roadway that has been in use for six

consecutive years in order to dedicate it to the public use. Leslie Township performed maintenance for six consecutive years as early as the 1970's. Use and maintenance of the roadway in the 1970's was sufficient to establish Gateway Drive as a public roadway. A township does not have to affirmatively attempt to dedicate a roadway, other than simply maintaining it for a period of six continuous years. In this case, the trial court found that Gateway Drive was maintained in such a fashion and dedicated as a valid township road. The Minnesota Court of Appeals agreed.

Additionally, there was adequate evidence presented at trial to establish Gateway Drive as a township road by common law dedication. There is sufficient evidence of public use of Gateway Drive for in excess of thirty years. Intent to dedicate a township road is found when a landowner acquiesces to public use of land as a township road. Gateway Drive was used by the public without objection prior to the Petitioners ownership of property adjacent to Gateway Drive. Also, Petitioners apparently did not complain about the existence of Gateway Drive until they instituted the present action against the Respondents.

C. Various Laws Cited By Petitioners Are Inapplicable To The Instant Case.

Petitioners incorrectly state that Respondents are required to conform to the alternative road recording procedure pursuant to Minn. Stat. §164.35. As previously stated, additional methods of dedicating roadways are available to townships. A township may dedicate a roadway pursuant to common law dedication,

which does not require the roadway to be recorded with the respective County Recorder. Therefore, it is not necessary for Gateway Drive to be depicted on a recorded town road map. The fact that Leslie Township may have attempted to use a town road map in the early 1990's to identify all of its roadways does not mean that Gateway Drive was not dedicated in the 1970's through common law or statutory dedication. In fact, the trial court and the Minnesota Court of Appeals confirmed that Gateway Drive is a valid town road that was dedicated in the 1970's, prior to Petitioners' ownership of their property adjacent to Gateway Drive. (App. 8a-13a).

Petitioners also cite the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as support for their claim that they are entitled to just compensation for the alleged taking of their property for Gateway Drive. However, this Act clearly does not apply to the current situation. This Act only applies in situations where there is displacement or taking of property as a result of a federal program or project. In this case, there is no dispute that the only governmental entity at issue is that of Leslie Township, not the federal government. Also, there is no federal program involved. Therefore, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 does not apply to this matter.

Petitioners also argue that the State of Minnesota's eminent domain laws codified in Minn. Stat. §117.50 through §117.56 require that Petitioners be compensated for the alleged taking of their property for Gateway Drive. However, this section of the

Minnesota Statutes specifically excludes any taking of property relating to town roads. In fact, Minn. Stat. §117.012 specifically states that "this chapter does not apply to the taking of property under laws relating to drainage or to town roads when those laws themselves expressly provide for the taking and specifically prescribe the procedure." Minn. Stat. §117.012. Laws for establishment of a town road specifically provide for the taking of property and a procedure. A town road can be established through common law dedication through continued use of the property by the public without objection by the property owner and statutory dedication pursuant to Minn. Stat. § 160.05. This occurred with Gateway Drive in the 1970's. Since Petitioners failed to object to the establishment of Gateway Drive for over 20 years, they are, as previously stated, foreclosed from seeking compensation for an alleged taking of their property for Gateway Drive and denying the existence of Gateway Drive. Additionally, it appears that Petitioners were not even the record owners of the property at the time that Gateway Drive was established. Therefore, if any party was entitled to compensation for taking, it would be the owners of the property at the time the alleged taking occurred.

Ultimately, it appears that the Petitioners feel there was an erroneous factual determination or the misapplication of an established rule of law. Review of an erroneous factual determination or the misapplication of an established rule of law by this Court is only granted in rare occasions. Since this matter does not meet the criteria for review by Writ of Certiorari under the Rules of the Supreme Court of the United States, review should be denied.

III. Since Petitioners Have Not Properly Asserted A Claim For A Taking Of Private Property For A Public Use, This Matter Is Not Ripe For Review.

"Mandamus is the proper vehicle to assert a claim for inverse condemnation." *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 616-17 (Minn. Ct. App. 1995), *review denied* (Minn. Dec. 20, 1995). An inverse condemnation action may require two separate factual determinations. *Alevizos v. Metropolitan Airports Commn.*, 317 N.W.2d 352, 360 (Minn. 1982) (Alevizos II). The mandamus court must determine first whether "there has been a taking or damage in the constitutional sense that it may compel the state to initiate condemnation proceedings." *Thomsen v. State*, 170 N.W.2d 575, 580 (Minn. 1969). If so, the matter goes before the commissioners to set the dollar amount of harm the owner has suffered. *Alevizos II*, 317 N.W.2d at 360; *See* Minn.Stat. 117.075 (1998). If appealed, the matter again goes to the district court fact-finder to address the amount of damages. *Alevizos II*, 317 N.W.2d at 360.

A. An Inverse Condemnation Claim Is The Proper Method of Seeking Compensation for A Taking.

It must also be noted that Petitioners did not bring a claim for a taking of their property for public use. In Petitioners' Complaint, they request payment of damages for replacement of trees and vacation of a portion of Gateway Drive. Petitioners did not seek money damages for a taking of their property for public use. In fact, even if Petitioners did intend to do this, the

procedure they chose is incorrect. The proper procedure for seeking compensation for a taking of private property for public use is through an inverse condemnation proceeding. An inverse condemnation proceeding must be commenced by seeking a Writ of Mandamus, asking a court to compel a governmental entity to begin condemnation proceedings. However, Petitioners did not choose to do this. Since Petitioners have failed to use the correct process for seeking condemnation and are now only bringing up the issue on appeal, they are not entitled to review of this matter.

IV. Quotations In Petitioners' Petition For Writ Of Certiorari Are Incorrect And Should Be Disregarded.

Additionally, Petitioners quote numerous state and federal cases in their Petition for Writ of Certiorari. Almost all of the quotations cited in the Petitioners' Petition for Writ of Certiorari are incorrect. Most of the quotations cited by Petitioners are not contained within the case Petitioners cite to. On page 17-18 of Petitioners' Petition for Writ of Certiorari, Petitioners cite to *State v. Sutton*, 65 N.W. 262 and claim it contains a quote which states: "When any court violates the clean and unambiguous language of the Constitution, a fraud is perpetrated and no one is bound to obey it." However, a review of *Sutton* reveals that no such quotation exists is the case. Furthermore, Petitioners cite to *Thompson v. Town of Berlin*, 91 N.W. 25 (1902), quoting "personal service of the notice of hearing on a petition to establish a town road 'must' be made on each occupant of the land which the proposed road will pass; i.e. upon the person having the actual possession and control of the

land." Once again, no such quotation exists in *Thompson*. Additionally, the following quotes are contained in Petitioners' Petition for Writ of Certiorari are incorrect:

> "Towns are liable for damages assessed to owners who lands are taken for town roads." *Woodruff v. Town of Glendale*, 1 N.W. 581 (1979);

> "These provisions have been interpreted to mean that property owners must receive the full diminution in the market value of their property occasioned by a taking." *Victor Co. v. State*, 186 N.W.2d 168 (Minn. 1971).

These quotations in Petitioners' Petition for Writ of Certiorari are simply not accurate. Petitioners claim that these cases contain these quotations. However, these quotations do not exist in the case cited. Since Petitioner has included numerous inaccurate quotations in their Petition. These incorrect citations should be ignored and not considered by the Court.

CONCLUSION

This matter simply does not meet the requirements for review by the Supreme Court. It is clear from Petitioners' Petition for Writ of Certiorari that they are simply unhappy with the determinations of the Todd County District Court, the Minnesota Court of Appeals, and the Minnesota Supreme Court. They also appear to be unhappy with several of their attorneys. There are no conflicting decisions involving the United States Court of Appeals or the Minnesota Supreme Court. There has been no decision on an important federal question in this matter. Petitioners simply believe their have been erroneous factual findings, and possibly a misapplication of a rule of law. Such claims are rarely reviewed by the Supreme Court of the United States. Ultimately, this matter simply does not warrant review by the Supreme Court of the United States as Petitioners have not offered a compelling reason for review.

Respectfully submitted,

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IB (3)

No. 08-710

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD AND SHARON THEUSCH,

Pro- Se Petitioners,

v.

TAD BERG, et al.,

Respondents,

On Petition For Writ Of Certiorari To The State Of Minnesota In The Court Of Appeals

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO FURTHER EXEMPLIFY DEPRIVATION OF CONSTITUTIONAL AND CIVIL RIGHTS

Richard and Sharon Theusch
22308 Gateway Drive
Osakis, Minnesota 56360
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

STATEMENT EXEMPLIFYING
DEPRIVATION OF CONSTITUTIONAL
AND CIVIL RIGHTS..... 1

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Brookfield C. v. Stuart, 234 F. Supp 94, 99 (U.S.D.C., Wash. D.C.) (1964)..... 9

Brown v. Legal Foundation of Washington, 538 U.S. 216 231-232 (2003)..... 8

Calder v. Bull, 3 Dall. 386, 388 (1798)..... 8

Myers v. United States, 272 U.S. 52, 151(1926)... 8

Olmstead v. U.S., 277 US 348, 485 S Ct. 564, 575; 72 Led 944..... 6

Wright v. United States, 302 U.S. 583. 588 (1938). 8

STATE COURT CASES

Barfnecht v. Town Board of Hollywood Township (232 N.W. 2d 420, (1975)..... 1

Sterling Township v. Edgar Griffin and Another, 309 M 320. 244 N.W. 2d 129, (1976)..... 3

CONSTITUTION

Article III, Section 2 (2)..... 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION (Continued)

Article VI, Clause 2..... 13

Article VI, Clause 3..... 14

Fifth Amendment To U.S. Constitution 8, 13

Fourteenth Amendment To U.S. Constitution.. 8, 13

FEDERAL LAW

Federal Uniform Relocation and Assistance Policies Act of 1970 "The Act".....2, 6, 13

U.S. Code, Title 18 Section 241..... 14

U.S. Code, Title 18 Section 242..... 14

U.S. Code, Title 28 Section 1331..... 15

U.S. Code, Title 28 Section 1343..... 16

U.S. Code, Title 42 Section 1983..... 16

U.S. Code, Title 42 Section 1985.....15, 17

U.S. Code, Title 42 Section 1986..... 18

MINNESOTA CONSTITUTION

Article XIV Public Highway System

Section 7..... 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

MS 117.031 (b) Attorney Fees..... 7

MS 160.02 Definitions..... 2

MS 160.04 Width of Roads..... 3

MS 160.05 Dedication of Roads..... 2, 3

MS 160.17 Road Construction Contracts, Counties and Towns..... 4

MS 162.081 Town Road Account..... 3

MS 164.07 Sub. 11 Establishment, Alteration And Vacation of Town Roads.....3, 4, 9

MS 609.64 Recording, Filing of Forged Instruments..... 5

OTHER

The American Ideal of 1776 By Hamilton Albert Long..... 18

Audit Report of the State of Minnesota, Town Of Leslie, March 1, 1973 by Rolland F. Hatfield, State Auditor..... 4

TABLE OF AUTHORITIES – Continued

Page

OTHER (Continued)

Declaration of Independence

(Quote from Original Transcript)..... 8

Minnesota Rules of Civil Procedure

Section II Rule 15.05..... 10

Minnesota Rules of Civil Procedure

Section V Rule 26.04..... 10

STATEMENT EXEMPLIFYING THE DEPRIVATION OF CONSTITUTIONAL AND CIVIL RIGHTS

In a landmark case regarding land owners alleging it was unconstitutional for a township to take their land to widen an old two rod road into a four rod road without "due process" the Minnesota Supreme Court ruled; "Privately owned land cannot become a public road by adverse use beyond the portion so used merely by a statutory pronouncement to that effect."... "Eminent domain procedures, however, effectively provide private landowners with notice, due process of law, and the opportunity to secure just and fair compensation in return for the property taken." *Barfnecht v. Town Board of Hollywood Township* (232 N.W. 2d 420, (1975). Thus, the Minnesota Supreme Court acknowledged if a township attempts to assert its authority over a portion "greater than that which it has maintained without providing due process for property owners, its actions are unconstitutional.

The unlawful taking of Petitioners' property was also unconstitutional. Petitioners were denied "due process" when the Township failed to give statutory "notice" in recording a 66 foot wide road on Petitioners' property in 1991; and when they failed to give statutory "notice" that they intended to physically assert their unlawful claim in 2003 by cutting down trees solely on Petitioners' property.

MS 160.05 protected old prescriptive easements maintained one year prior to 1957; however, the road on Petitioners' property fails to meet this criteria. On the contrary, the road (trail) on Petitioners' property did *not* exist until *after* 1970. "Town Roads include those roads which were "maintained one year prior to 1957" (MS 160.02.)

Valid road law cited in Petitioners' Writ of Certiorari, eminent domain law, and the Federal Uniform Relocation and Assistance Policies Act of 1970 governs expanding old roads and establishing *new* roads, properly and lawfully and should have been utilized to acquire the "66 foot town road" recorded on Petitioners' property in 1991. Petitioners continually instructed counsel to

challenge the Township's utilization of MS 160.05 to acquire their property for the *new* public road without just compensation. MS 160.05 may also no longer be utilized in establishing "widths" of old prescriptive easements since Minnesota law requires *all* town roads to be lawfully "recorded" (MS 164.07 Sub. 11)..." at 66 feet wide" (MS 160.04.) The Minnesota Supreme Court has ruled: "all road orders, regardless of establishment *must* be recorded with the county recorder." *(Sterling Township v. Edgar Griffin and Another,* 309 MN 320. 244 N.W. 2d 129, (1976).

Since town roads are "Created in the County State Aid to Highway Fund" (MS 162.081), and the Minnesota Constitution authorizes this fund, it is of further importance that town roads be lawfully recorded.

"There is hereby created a county state-aid fund... The legislature may authorize the counties by law to use a part of the funds apportioned to them to aid in the construction, improvement and maintenance of other county highways, *township roads,...* within the respective counties." (Minnesota

Constitution, Article XIV Public Highway System, Section 7)

As well as being properly recorded with the county auditor (MS 164.07 Sub. 11), Minnesota Law also requires that town roads be constructed with "proper plans and specifications" (MS 160.17 Sub. 1) and that town road "construction be opened for bids." (MS 160.17 Sub. 2). Leslie Township was cited for violation of MS 160.17 Subd. 1 and 2, and violation of MS 164.07 Subd. 11, regarding the new "lake road" which forked through Petitioners' property in the public record: *Audit Report of the State of Minnesota Town of Leslie, March l, 1973 by Rolland F. Hatfield, State Auditor.*

In Leslie Township's own recorded and certified Town Road Resolution (Page 15, Court Exhibits 16 and 17), it acknowledges the plats written under "Tract Information," which Leslie Township utilized in preparing its 1991 recorded Town Road Resolution. Leslie Township documented the "Little Osakis Acres Plat" (1981) and the "Little Deer Beach Plat" (1960) both in "Section 26" and "Hughes Lake Addition Plat" (1984) in "Section 25" under T597

(Bambi Trail aka Gateway Drive). The 1960 and 1981 plats clearly illustrate the lake road in Section 26 as 50 feet and 26 feet wide. It was also clearly illustrated that Petitioners' property in Section 25 was not a part of the Hughes Lake Addition Plat, the 1960 plat or the 1981 plat, whatsoever, yet Leslie Township falsely recorded a 66 foot wide town road easement through Petitioners' property anyway. (Page 15, Court Exhibits 16 and 17.)

"Whoever intentionally presents for filing, registering, or recording, or files, registers, or records such instrument when genuine may be sentenced..."(MS 609.64 Recording, Filing of Forged Instrument.)

Petitioners were without recourse to impede the recording of the false instrument against their Legal Abstract. Acquiring private property on a false instrument victimizes the weak who do not have the resources to stand up to the unlawful taking.

A 66 foot (four rod) town road is also depicted through Petitioners' property on the 1983 half section map prepared by the previous Todd County Surveyor (Court Exhibit #2), and although this map

was revised two times (1990 and 1993,) the error remained uncorrected. Petitioners also had no recourse to impede the inaccurate mapping of a 66 foot road on their property on this county half section map.

> "Decency, security, and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizens. In a Government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Crime is contagious. If government becomes a lawbreaker, it breeds contempt for the law..." *Olmstead v. U.S.,* 277 US 348, 485 S Ct. 564, 575; 72 Led 944.

The Federal Uniform Relocation and Assistance Policies Act of 1970, adopted by the State of Minnesota, should have prevented government from "strong arming" and "bullying" Petitioners into complying with their wishes without fair value for their land, however; "The Act" was not utilized by Leslie Township.

"In any case where the court determines that a taking is not for a public use or is *unlawful,* the court shall award the owner reasonable attorney fees and other related expenses, fees, and costs in addition to other compensation and fees authorized by this Chapter." (MS 117.031 (b) Attorney Fees).

It is a fundamental right that private property may *not* be taken and given to another party without just compensation:

> "If a new road...were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." Ibid. Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now the individual, treating with an individual for an exchange." Ibid. "When the public took property, in other words, it took it as an individual buying property from another typically would; for one's own use. The Public Use Clause, in short, embodies the Framers'

understand that property is a natural, fundamental right, prohibiting the government from "tak[ing] property from A. and giv[ing] it to B." *Calder v. Bull,* 386, 388 (1798).

"The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." It is presumed in this clause "that no word was unnecessarily used, or needlessly added." *Wright v. United States,* 302 U.S. 583. 588 (1938). "It cannot be presumed that any clause in the constitution is intended to be without effect." *Myers v. United States,* 272 U.S. 52, 151 (1926). The taking must be for a "public use" and "just compensation" must be paid to the owner." *Brown v. Legal Foundation of Washington,* 538 U.S. 216 231-232 (2003).

In the original draft of the *Declaration of Independence,* before it was ratified July 4, 1776 John Locke wrote: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable

rights, that among these are Life, Liberty and *Property.*"

Petitioners allege that the extraordinary irregularities in this case involving their private property are conclusive of a combined effort to deprive them of their constitutional and civil rights.

Although it states in the filed August 6, 2006 letter to the District Court Judge, "townships are now required by law to record their roads," counsel failed to cite MS 164.07 Subd. 11.

The opposing counsel's attempt to suppress Respondents' failure to give "notice" in his pre-trial Motion in Limine, was indicative of further denying Petitioners' constitutional right to "due process of law."

"...an...officer who acts in violation of the Constitution ceases to represent the government." *Brookfield C. v Stuart,* 234 F. Supp 94, 99 (U.S.D.C., Wash. D.C.) (1964.)

The Honorable Judge Wayne Farnberg's order *denied* Respondents' above pre-trial Motion in Limine to suppress "notice," yet the Petitioners' own counsel failed to present the order for signing until

four months *after* the court trial; thereby, depriving Petitioners' "due process of law" and "equal protection under the law." "This order shall control the subsequent course of the action and shall be modified only to prevent manifest injustice." (Minnesota Rules of Civil Procedure, Section II Rule 15.05.)

Although Petitioners answered Respondents' interrogatories and requests for documents immediately and fully, Respondents *"denied"* the Petitioners' similar requests providing an unfair advantage to the Respondents at trial. "...the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." (Minnesota Rules of Civil Procedure Section V Rule 26.04.)

The sworn trial video testimony of the previous Todd County Surveyor of fourteen years addressing the unlawful road on Petitioners property, though delivered to the court at trial, was suppressed during trial, creating further obstruction of justice.

The fact-finding procedure employed by the District Court was not adequate to afford Petitioners

a full and fair hearing. The jury dismissal without explanation, the evidence taken back during the trial, evidence not marked appropriately before trial, Petitioners' exhibits left at the office by their own counsel, and the Respondents delivering evidence at trial which was not provided to Petitioners during discovery, all obstructed justice and further denied "due process of law."

The unjust mediation forced upon the Petitioners after Respondents entered their property unlawfully and damaged it, further oppressed the Petitioners and inflicted financial harm on them. Petitioners were further oppressed by the unjust District Court order to pay Respondents "Costs and Disbursements" which left unchallenged would have inflicted significant financial harm.

Petitioners were further intimidated and oppressed when the Township sent experts and officials to their property without Petitioners' consent and were unnecessarily served *twice* by Respondents' counsel with the lowest estimate of the tree damage.

The 2005 diagram prepared by Respondents' hired surveyor was utilized in the Court Trial to denote a "road" on Petitioners' property; however, the drawing delivered to the court was not a "legal" road survey. Yet, this drawing was given significant credibility in the Courts Findings of Fact. Petitioners' counsel failed to challenge this survey. Petitioners hired their own experts; [1] however, Petitioners were informed by their counsel that other witnesses as well as their surveyor (Northstar), did not want to testify.

Again, Petitioners were denied "due process" and "equal justice under law." Petitioners were also excluded from strategies, decisions and laws utilized throughout their "five- year" litigation process.

The failure to provide Petitioners with statutory "notice" of the unlawfully recorded road and failure to provide "notice" to cut down Petitioners' trees, combined with the extraordinary irregularities of the trial, facts and events of this case, deprived Petitioners of "due process", "just compensation" and

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[1] Page 9 line 4 of Writ of Certiorari – "These" included Forester and Appraiser. Northstar surveying did not testify at trial.

"equal justice under law" contrary to the provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution and contrary to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

The U.S. Constitution and Federal Law is the "law of the land" and has supremacy over state law, thereby, these further laws of the United States are asserted:

1. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every Sate shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI Clause 2 of the Constitution of the United States.
2. "In all cases...in which a state shall be party, the Supreme Court shall have original jurisdiction." Article III, Section 2(2) U.S. Constitution.

3. "all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution." Article VI, Clause 3.
4. "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United Sates, or because of his having so exercised the same; or "If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured. They shall be fined..." United States Code, Title 18 Section 241.
5. "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, shall be fined..."United States Code, Title 18 Section 242.

6. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." United Sates Code, Title 28, Section 1331.

7. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"

(l) "To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;"

(2) "To recover damages from any person who fails to prevent or to aid in preventing any wrongs mention in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent."

(3)"To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United

States..." United States Code, Title 28, Section 1343.

8. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any States..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress..."United States Code, Title 42, Section 1983.

9. "...(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;...in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the

object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising and right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." U.S. Code, Title 42, Section 1985.

10. "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as respondents in the

action;..."United States Code, Title 42 Section 1986.

It is a sad day when our government's commitment to Constitutional Rights of individuals is sacrificed and further harm is inflicted on them for public gain.

"Any sacrifice of any right of any individual is morally wrong. It is also potentially dangerous to all rights of all individuals and, therefore, threatens the general welfare of the common good, which depend basically upon observance of due rights of each and every individual." "Depriving an individual of his rights through government coercion, or by other individuals is to victimize potentially every individual because this sets a precedent which is conducive to later disregard the rights of all." (The American Ideal of 1776 by Hamilton Albert Long.)

Therefore, Petitioners pray their request for a Writ of Certiorari in the Supreme Court of the United States be granted.

Respectfully submitted,

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23

(5)

No. 08-710

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD AND SHARON THEUSCH,

Pro- Se Petitioners,

v.

TAD BERG, et al.,

Respondents,

On Petition For Writ Of Certiorari To The State Of Minnesota In The Court Of Appeals

PETITION FOR REHEARING

Richard and Sharon Theusch
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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... . ii

STATEMENT OF

REASONS FOR GRANTNG REHEARING..... 1

I. The Questions Presented Are Of Exceptional Importance And Require This Court's Intervention..... 1

II. The Appellant Court's Decision Is Wrong In Its' Merits..... 2

III. The Appellant Court's Decision Conflicts With This Courts' Precedents.....13

IV. The State and Federal Courts Are Split...17

CONCLUSION.....19

CERTIFICATE OF GOOD FAITH
(at end of document)

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

Jones v. Flowers, 547 U.S. 04-1477 (2006)..... 17

Kelo et al v. City of New London, 547 U.S. (2005) 17

Marbury v. Madison, 5 U.S. (2 Cranch) 137, 174, 176, (1803).....14

Mullane v. Central Hanover Bank and Trust, 339 U.S. 306, 414 (1950).....16

Norton v. Shelby, 118 U.S. 425 p.442 (1886).....16

Olmstead v. United States, 277 U.S. 438 (1928).....16

STATE COURT CASES

Alton v. Wabedo Tp., 524 N.W. 2d 278 (Minn. App. 1994)..... 7

CONSTITUTION

Fifth Amendment..... 2

Fourteenth Amendment.....2, 16

TABLE OF AUTHORITIES - Continued

Page

FEDERAL LAW

U.S. Code, Title 18 Section 1021..... 5

U.S. Code, Title 42 Chapter 6l
Section 24.102.....15

U.S. Code, Title 42 Chapter 1981..... 18

U.S. Code, Title 42 Chapter 1982.....2

STATUTES

M.S. 160.02 Definition (Town Road)..... 3

M.S. 160.04 Width of Roads.....2, 3, 6

M.S. 160.05 Dedication of Roads.....2, 3, 6, 8, 13

M.S. 164.07 Establishment, Alteration and
Vacation of Roads.....3, 7, 8, 12

M.S. 164.35 Alternate Recording of Town
Roads..... 6, 7, 8

M.S. 164.36 Town Authority Over Recorded
Road.....2

M.S. 505.03 Government Approval.....13

M.S. 507.34 Unrecorded Conveyances Void in
Certain Cases.....5

TABLE OF AUTHORITIES – Continued

Page

STATUTES – Continued

M.S. 609.415 Definitions..... 12

M.S. 609.43 Misconduct of a Public Officer or Employee..... 12

M.S. 609.456 Reporting to State Auditor and Legislative Auditor Required.....10

M.S. 609.605 Trespass..... 3

OTHER

Audit of the Town of Leslie by State Auditor Roland F. Hatfield (1973)..... 5

Federalist Papers No. 78 Alexander Hamilton.. 17

George Sutherland Associate Justice of the Supreme Court..... 18

Laws of Minn. For 1982 Ch. 424 Sec. 40 Subd. 1.....10

Sixteenth American Jurisprudence 2d, Section

TABLE OF AUTHORITIES – Continued

Page

177 Late 2nd Section 256..... 14

The Township Road Study by the Sixth Regional Development Commission and Proposal To An Alternate Method to Record Township Roads – Final Report to MN DOT 1984/1986.....3, 5, 6, 9

STATEMENT
REASONS FOR GRANTNG REHEARING

I. QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE AND REQUIRE THIS COURTS INTERVENTION

The questions presented are of national importance. The Appellant Decision discards valid state law and utilizes an invalid statute for the purposes of acquiring private land for public use. It deepens an entrenched conflict that states may utilize invalid statutes in the event of unlawfully recording town roads to obtain "private property for public use" thus denying citizens of their property, constitutional and civil rights without due process of law and splits State and Federal government.

Federal law provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to

inherit, purchase, lease, sell, hold, and convey real and personal property." (U.S. Code Title 42 Section 1982.")

A taking is reached when a government entity destroys the net income from prohibiting some of the rights to use of the property. Unlawfully recording a false instrument falsely claiming 66 foot roads against private legal land titles without proper statutory "notice" strips citizens of their rights to sell, hold and convey their property as guaranteed by U.S. Code 42 Section 1982 and splits the State and Federal Government on property rights issues and threatens to overturn the 5th and 14th Constitutional Amendments.

II. THE APPELLANT COURT DECISION IS WRONG ON THE MERITS

Utilization of MS 160.05 that dedicates a road by "maintenance," is by law, invalid; and is a violation of State law that requires town roads to be 66 feet (four rods) wide. (MS 160.04.) *Maintenance* is authorized only on lawfully "*recorded*" town roads. (Minn. Stat. 164.36.) The alleged road on

Petitioners' property is neither lawfully recorded (MS 164.07 Subd. 11), is not lawfully 66 feet wide (MS 160.04), and is not a "Town Road" as defined in statutes. (M.S. 160.02.) Although many roads may exist by the six-year statute (Minn. Stat. 160.05), and therefore have an easement for only that portion of the road, which is maintained; "this is a violation of Minn. Stat. 160.04 which requires roads to have 66 foot (four rod) right-of-ways." *(The Township Road Study by the Sixth Regional Development Commission 1984.)*

Petitioners hold title fee to the property covered by the alleged road and do not receive a tax credit for the road. The Township has no legal right of claim to Petitioners' property. "Trespass on the premises of another and without right, ..." is "Trespass." (Minn. Stat. 609.605 Subd. 1, D3.) Only Petitioners property was damaged. The row of trees, under power lines, across from Petitioners' property, were left standing.

Alluding to a road on a map or document is not a valid right of claim to private property.

When asked how a 50 foot road became a 66 foot road as it enters Petitioners' property the previous County Surveyor stated, "I don't know...ask the Township..." (See: Sworn trial deposition 8/4/06.)

Unlawfully recording and certifying a false claim affecting private property also slanders the Legal Abstract of Title. No individual in the United States can be expected to take action to protect his property rights and legal Abstract of Title unless he is given "notice" of the intended claim against it. Petitioners were not made aware of the unlawful claim against their property until August 2006. (App. 74.) The Township's recorded 66 foot claim is even wider than the 50 foot 2008 unjust Appellant ruling.

Federal law provides:

> "Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by law may be recorded, knowingly certifies falsely that such *conveyance* or instrument has or has not been recorded, shall be fined under this title or imprisoned not more than five years, or both."

(U.S. Code Title 18 Section 1021 Title Records.)

Minnesota law provides: "Every conveyance of real estate shall be recorded in the office of the county recorded where such real estate is situated;..." (507.34)

"Booth's Town and City Manual notes that any road establishment, alteration or vacation order should be filed with the county auditor as well as the county recorder." (*Town Road Study Sixth Regional Development Commission 1984.)*

However, the township failed to do so in establishing Bambi Trial. *(Audit Report of Leslie Township by, State Auditor. 1973)*

The township again overstepped its authority in falsely recording a "66 foot" town road on Petitioners' property.

In a report to Minnesota Department of Transportation it states:

"A valid road order is defined as a road order which a court will recognize and honor as establishing a township road under the law. An invalid road order is one which the court will not

recognize and not honor as establishing under the law."

"If the road order has not been recorded with the County Recorder and the road has not been developed and maintained by the township, the township will not succeed in claiming that the township road described in the road order is a township road." *(Proposal for an Alternate Method to Record Township Roads – Final Report to Minnesota Department of Transportation 1986.)*

It was ruled that Petitioners' claims were "barred by Minn. Stat. 160.05." Town Roads are required to be lawfully recorded at "66 feet wide" and maintenance is authorized only on "*recorded*" roads. Therefore, the Appellant decision is wrong on the merits of this case. The Court of Appeals also ruled that "whether the township failed to satisfy the requirements of Section 164.35, Subd. 4, is irrelevant because Gateway Drive has been established as a public road by statutory dedication under section 160.05." Petitioners respectfully disagree. Minn. Stat. 160.05 is not a valid law and is not applicable in this case. Minn. Stat. 160.04, which requires

roads to be 66 feet wide, is valid. Minn. Stat. 164.35 was created by the legislature to provide a comprehensive procedure for recording existing town roads. A town following the statute basically passes a resolution indicating its intent to consider recording its roads, develops a map of its roads, determines if any right of way needs to be acquired in order to make the right of ways 66 feet wide, gives "notice", holds a hearing, follows the Minn. Stat. Sec. 164.07 procedure if addition right of way must be acquired, adopts by resolution and then records the map. (MS 164.35 Subd. 4.)

The constitutionality of this procedure was challenged. Because the court found the procedure could result in a town claiming private property it had not acquired as part of the road, (although it found to have properly followed procedures), the court held that the statute was unconstitutional. It said that, "even though notice is required, the statute does not contain a mechanism for compensating owners for any land." *(Alton v. Wabedo Tp.* 524 N.W.2d 278 (1994.) The Statute was amended to provide a procedure for acquiring and paying for any

land that is taken as part of the process. (MS 164.35 Subd. 4 (g.) Specifically, the statute directs the board to use the formal town road establishment and alteration procedure in Minn. Stat. Section 164.07 if land must be acquired. Minn. Stat. 164.35 is relevant. It provides "notice" (due process of law) as well as providing compensation for property taken for public use. Utilizing Minn. Stat. 160.05 to take private property for public use instead of utilizing valid law is contradictory and splits the State and Federal courts.

The Town Road Study requested by the Minnesota State Legislature was undertaken by the Minnesota Department of Transportation to determine the extent of maintained township road mileage throughout the State of Minnesota so that proper allocation of state dollars might be made to township government for road construction and maintenance. This study states:

> "It is important to note that the resolution will be reviewed by an attorney examining title to any property over which any township road described in the resolution passes...and

> equally important that the resolution contain the factual information upon which the township relies in asserting its claim to the various roads described therein."

"The purpose of the resolution is to inform the public of the township roads claimed by the township and the basis of each such claim."

"In the absence of a procedure such as this, the expenditure of township funds on township roads for which no documents are recorded in the office of the County Recorder may be questioned, i.e. the township is spending public funds upon a road which it does not own."

> "Finally, it is not known if the Uniform Real Property and Relocation Policies Act applies to townships. If it does, townships might be forced to monetarily compensate property owners when they try to expand their claim on a road beyond the maintained portion. The implications of such a requirement are disastrous." *(Township Road Study Final Report to Minnesota Department of Transportation 1984.)*

If citizens of townships are being denied their constitutional right to "just compensation for property taken for public use" because townships may have to compensate them for the "government takings" than this would be "disastrous" for many citizens in all Townships across the United States..

Failure to record conveyances accurately and properly results in unlawful use of property.

> "State Auditor. Whenever a public employee or public officer of a political subdivision or charter commission discovers evidence of...unlawful use of public funds or *property*...the employee or officer shall promptly report to law enforcement and shall promptly report in writing to the state auditor a detailed description of the alleged incident or incidents." (MS 609.456.)

Minn. Stat. 160.05 was amended in 1982. Instead of it providing dedication of town roads "to width of two rods on each side of the center line," it was amended to read dedication was to "width of actual use." Laws of Minn. Ch. 424 Sec. 40 Subd. 1 (1982.) Respondents recorded a "66 foot" town road

on Petitioners' property in 1991 without notice and without following proper procedures.

Townships have no inherent powers and instead only have those powers delegated by the legislature. Knowingly exercising a power the town does not have or knowingly exceeding a power it does have is unlawful. Only under the power of legislature do townships have the authority to maintain and establish roads. Respondents violated the color of law statute by unlawfully obtaining and unlawfully maintaining Petitioners' property. Lawfully recording the road was relevant and a critical part of preserving any claim of right to Petitioners' property by the Respondents. Townships who overstep their authority, without accountability threaten the rights of citizens in all townships.

"A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced..."

"1) intentionally fails or refused to perform a known mandatory, nondiscretionary, ministerial duty of the office or employment within the time or in the manner required by law, or..."

"2) in the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in the capacity; or

"3) under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights; or

"4) in the capacity of such officer or employee, makes a return, certificate, official report, or other like document having knowledge it is false in any material respect." (M.S. 609.43.)

"Definitions...1) "Public Officer"...f) any person exercising the functions of a public officer." (M.S. 609.415.)

Petitioners were also not given "notice" of the vacation of a portion of the original platted Bambi Trail along the section line which was "dedicated to the public forever." (App. 62.) A portion of this platted road was vacated without notice to the Petitioners. The wider road was recorded forking through Petitioners' property without lawful notice. Proper vacation procedures require "hearing" and "notice" to affected property owners. (M.S 164.07,

Subd. 2.) "When a plat has been approved it shall be certified by the town clerk or auditor as the case may be." (M.S. 505.03.) The 1960 Recorded Plat of Little Deer Beach, which includes Bambi Trail, lacks the signature of a township chairman or official. Thus, the township has no legal right of claim to the "50 foot" and "26 foot" platted portions of the platted trail, nor to the unlawfully recorded "66-foot" unplatted portions of the dead end trail.

III. THE APPELLANT COURT'S DECISION CONFLICTS WITH THIS COURTS PRECEDENTS

State courts are bound to give effect to federal law when it is applicable and to disregard state law when there is a conflict. The decision of the Appellant Court clearly establishes an inferior precedent for government acquiring private property and the invalid local law utilized in this case should be discarded. The substance of Minn. Stat. 160.05 runs contrary to the U.S. Constitution and Federal Law. "All laws which are repugnant to the

Constitution are null and void." *Marbury v. Madison,* 5 U.S. (2 Cranch) 137, 174, 176, (1803.)

There is a deep conflict between state and federal courts regarding the utilization of an abolished statute to take private property for public use in the event of an unlawfully recorded road. It is impossible for law, which violates the Constitution to be valid.

> "The general rule is that an unconstitutional statute, though having the form and the name of law, in reality is no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it." *(16th American Jurisprudence 2d, Section 177 late 2nd Section 256.)*

Taking the property on a false instrument and than utilizing an invalid statue to empower the unlawful taking, contradicts Federal law which sets a high standard of "fair and equitable treatment"

when property is taken for public use. The Appellant decision is contrary to the provisions envisioned in Federal law and creates a split between State and Federal government. In acquiring property for public use Federal law provides:

"d)...Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property."

"h)...The Agency shall not advance the time of condemnation or defer negotiation or condemnation..."

"l)...If the Agency intends to acquire an interest in real property exercise of power of eminent domain, it shall institute formal condemnation proceedings and [not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property]." (U.S. Code Title 42 Ch.61 Section 24.102.)

Utilizing a statute of local law, which, by law is invalid, to empower townships to take private property for public use is unconstitutional and wrong."

"An unconstitutional act is not law, it confers no right; it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." *(Norton v. Shelby,* 118 U.S. 425 p. 442.)

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent...the greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding." *(Olmstead v. United States,* 277 U.S. 438 (1928.)

> "The due process clause of the Fourteenth Amendment provides that "no state shall deprive any person of life, liberty, or property, without due process of law." (U.S. Const. Amend. XIV Section I.) A requirement of due process "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [State] action and afford them an opportunity to present their objections." *(Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 314 (1950.)

"The due process clause requires the State take reasonable additional steps to provide notice." *Jones v. Flowers,* 547 U.S. 04-1477 (2006.)

"The taking must be for public use and compensation must be paid." *Kelo et al v. City of New London,* 457 U.S. (2005.)

Repeated failure to give proper statutory "notice" is a key element in the "unlawful" taking posed in the questions to this court and an important irregularity, which denied the rights of Petitioners. The unconstitutionality of utilizing the invalid local statue is clear. "No legislative act which is contrary to the constitutional can be valid. When government violates the Constitution, government then becomes an illegal entity and relinquishes its Constitutional authority. This places the burden of correction squarely on the people." *(Federalist Papers No. 78 Alexander Hamilton.)*

IV. STATE AND FEDERAL COURTS ARE SPLIT

Federal law provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contract, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and *property." (*emphasis added) (U.S. Code, Title 42 Section, 1981.)

The decision of the Appellant court has the potential to strip citizens of their rights to be secure in their property and splits State and Federal courts.

"To give him liberty, but take away his property which is the fruit and badge of his liberty, is to still leave him a slave." *(George Sutherland, Associate Justice of the Supreme Court, 1921.)*

An invalid and inapplicable statute of local law, utilized to establish a townships' claim to private property for a *new* road or to widen old roads creates conflicts with constitutional and federal law and splits State and Federal courts. The invalid statute of local law should be discarded and Federal and Constitutional law should be applied. This unjust

decision sets a precedent for further deprivation, abuse and bias in the judicial system and calls for an Appellant discretionary review.

CONCLUSION

There is a deep and retractable conflict regarding the questions presented, therefore, the Petitioners' Request for Rehearing should be granted.

Respectfully submitted,

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No. 08-710

CERTIFICATE OF GOOD FAITH

March 20, 2009

Petitioners hereby certify that the following Petition for Rehearing was **Submitted in good faith,** and **not for the purpose of delay.**

/s/_____

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Subscribed and sworn to before me

On March 20, 2009

_____

Notary Public

Alexandria, Minnesota